Supreme Court, U.S.
FILED

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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1995

RUDOLPH W. GIULIANI,
as Mayor of the City of New York, et al.,

Petitioners,

- against -

HAROLD YOURMAN, et al., etc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL A. CROTTY
Corporation Counsel of the
City of New York,
Attorney for Petitioners,
100 Church Street,
New York, New York 10007.
(212) 788-1035

LEONARD J. KOERNER,*
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

* Attorney of Record.

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QUESTIONS PRESENTED

This case presents questions that also are presented in Auer v. Robbins, No. 95-897, in which this Court granted the petition for a writ of certiorari on June 24, 1996, and Wisconsin v. Mueller, No. 95-586, in which a petition for a writ of certiorari is pending. All three cases are challenges by employees of a State or local government to their employers' view that they are exempt from the provisions of the federal Fair Labor Standards Act ("FLSA") because they are executive or administrative employees, 29 USC section 213(a)(1). The employees argue that they do not satisfy the "salary basis test" for exemption set forth in regulations of the Department of Labor ("DOL"), 29 CFR section 541.118.

1. Is the salary basis test, as applied to state and local government employers, arbitrary and capricious, because it is irrational and absolutely contrary to Congress's intent, and therefore void under the Administrative Procedure Act ("APA")? This issue would be presented if the petition in Wisconsin v. Mueller were granted.

2. Is the salary basis test a "regulation" of the Department of Labor or a mere "interpretation" so that it is entitled to deference only to the extent that it is persuasive? This issue also is relevant to Auer v. Robbins and Wisconsin v. Mueller.

3. Is the DOL's application of the salary basis test to state and local government employees violative of the tenth amendment, because it is the result of a failure of the national political process, or if not should the salary basis test be interpreted to avoid a conflict between the FLSA and the tenth amendment? The first of these questions also is raised by the petition in Wisconsin v. Mueller.

4. Is the salary basis test violated, so that employees in question are not exempt, when the employees are merely subject to the theoretical possibility of salary deductions

that would violate the salary basis test, or must actual deductions, violative of the test, occur before an employee loses exempt status? This question also is raised by the petition in Auer v. Robbins.

5. If deductions impermissible under the salary basis test occur but are infrequent: (a) is the regulations' "window of correction" available so that the exemption is not lost and if not (b) is the exemption lost only for the employee in question and only for the work-week in which the impermisslbe deduction is made? Part (a) of this question is raised in the petition in Auer v. Robbins.

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PARTIES TO THIS PROCEEDING

Petitioners are Rudolph W. Giuliani, Mayor of the City of New York; The Board of Education of the City School District of the City of New York; and the New York City Health and Hospitals Corporation, a separately incorporated public benefit corporation. There are over 430 respondents; each is a natural individual. They are: Yvette Wynne, Mary White, Ellen Wilson, Phyllis Williams, Harriett Williams, Ethel Wells, Mary Walton, Eduardo Vidal, Antonio Turrigiano, Esther Turnbull, Norman Trosten, Karl Trachte, Notre Thomas, N. Lael Telfeyan, Kathryn Tate, Deborah Taitt, Elbert Sweat, Sharon K. Summerville, Arlene Stringer, Charles Sternberg, Rea Stein, Neila Spence-Reid, Stephen Smith, Patrick Smith, Patricia Smith, Mary Shower, Michael Shady, Joseph Sepulveda, Florence Schulman, Joanne Schoonmaker, Barbara Schoen, Lenore Schlossberg, Raymond Saes, Herbert Rosenblum, Louis Romasco, Philip Rigaud, Camille Ranieri, Joyce Prever, Rhoda Poblet, Peter Peta, Arnold Pessin, June Nearon, Marilyn Mungen, Lucy Mueller, Robert Moss, Beverly Moran, Marilyn Moch, Irving Mittenberg, John Milioti, Yvonne Mccoy, Roberta Mcbride, Harriet Mannheim, Gerald Maguire, Carol Lyttle, Martin Levine, Michael Lessinger, Inez Lambert, Lawrence Konstan, John Kelly, Marsha Kellam, Anita Kasen,Yvonne Jones, William Jones, Laura Jones, Barbara Howard, Katherine Holley, Morris Heney, Lillian Heard, Thomas Hargrove, Mattie Harris, Jeanette Greaves, Robin Goodstein, David Goldstein, John Gargano, Joan Frimmer, Linda Freeman, Raymond Frasene, Anita Folkerth, Gloria Ferreras, Stephen Ferrer, William Ferrante, Richard Fenton, Evelyn Felix, Anne Eskridge, Eileen Erickson, Edward Ellis, Stuart Eber, Peter Early, William Dworkin, Marcella Doswell, Joseph Donini, Rickey Dennis, Dennis Deering, Elizabeth Daversa, Anthony Curry, Anthony Curcio, Dominick Cucinotta, Juanita Copes, Nereida Cintron, Carmen Ceriobelle, Sharyn Brown, Brenda Brown, Christene Brock, Sandra Bounty, Louis Bongiovi, Martin Bokser, Elaine Blumpkin, Anita Bloom, Thelma Blash, Howard Beedles, Ruth Barrentine, Dorothy Alicea, Philip Aldridge, Lawrence Weintraub, Ted Weg, Louis Sommo, Walter Romm, Milton Peek, Robert Pardi, Elizabeth Lane, Patricia Kushner, Alfred Goldman, Frederick Ewald, Calvin Evelyn, Sam Eiseman, Joseph Anastasio,

James Ahern, Irene Prager, Robert Losada, Robert Kares, Efron Hyman, Henry Eisig, Richard Baxt, Sam Galen, Martin Oesterreich, Thomas Sweetman, Walter Mccarthy, Richard Lang, Joseph Higgins, Donald Forster, Joseph Degeorge, Thomas Clarke, John Cashin, Richard Breuninger, Albert Alias, Felice Sicuranza, Robert Naeder, Connie Morrison, William Miller, Frank Meyer, Walter Mead, Michael Mcnamara, Michael Lamonica, Leonardo Ingravallo, Julius Hardaway, Frank Garrison, Frederick Frenz, Susan Downey, Edmond Digiulio, Jerome Demers, Steve Austen, Robert Valinotti, Calvin Thorbourne, Jospeh Taffaro, Herbert Siegel, Henry Serino, Alfred Schmidt, Peter Lusardi, Perry Lindsay, Thoedore Klopsis, Lee Kerbel, Angelo Guzman, Earl Evans, Edward Coffey, Vito Catalano, Bernard Browne, Louise Becton, Juanita Arsenic, Arthur Wrubel, Louis Soccoa, Raymond Schaeffer, Jorge Santos, Richard Matarangelo, Jerome Liebowitz, Frederic Levine, Robert Jean, Janie Jacobs, John Hendrickson, Norine Enrione, Lawrence Berman, Jessie Barringer, Jack Zimmardo, James Wynne, Roy Westbrook, Richard Vela, Joseph Timpone, Charles Thompson, Paul Stolz, Paul W. Stevenson, Adolph Stampfel, John Smith, Aristide Siegel, Louis Scalzo, Philip Saglimbene, Rocco Sabatella, Sam Russo, Paul Rupp, John Rowell, Michael Roselle, Foster Romano, Carl Ranieri, Albert Rahner, Anthony N. Punzi, Carmine Procida, Bartholomew Porpora, Rocco Panico, Vincent Palazzola, John Oliviero, James Moss, Gregory R. Morris, John Moran, Peter Montalbano, Walter Mitchell, John Mezzacapo, John Melidones, James Mccabe, Mario Mauro, Gerald Manza, Richard Mancuso, Thomas Maher, Jack Lorenzo, William Lonergan, Anthony Lofaso, Harold Levin, Alexander Leiter, Charles Leal, Robert Lanzone, Francis Landers, Joseph Lanaro, Richard Krepela, Richard Koch, Peter Kelly, Julian Jackson, Charles Irwin, Patrick Hurley, Jonah Holley, Maurice Hogan, Pedro Hernandez, Donald Harris, Charles Guinan, Sydney Glassberg, Thomas Gibney, John Genco, Joseph Galarza, Frank C. Fox, John Fogg, Albert Fitton, Robert Ferrieri, Jack Farley, Louis Etergineoso, Anthony Etergineoso, Carl Dulisse, William Dolan, Theodore Digilio, John Devaney, Vincent Degennaro, Frank Capabianco, Werner Dangel, Stephen Congelosi, Joseph Cocozza, William Cloke, Dennis Cleary, Anthony Ciuffini, Philip Ciocci, Benedict Cecere, George Caulfield, Robert Callahan, Norman Butler,

Michael Burke, John Brady, George Bossert, Richard Black, Frank Beggs, Joseph Barsalona, Sam J Baglino, John Ardizone, James Ardizone, Paul Arcabasso, Charles Anastasia, Joseph Angelo, Corratta Walker, Beverly Session, Deborah Duvdevani, Frederick D'alo, Donald Williams, Gladys Schlanger, Lawrence Mcdevitt, Margery Manley, Thomas Kaiser, Allan Goldberg, Scott Bertram, Peter Abatangelo, Harold Yourman, Richard Okolsky, Frank Mastandrea, Michael Kane, Jay Gingold, Paul Zoltanetsky, Herbert Tschudi, Janis Skinkis, Lawrence Scheiber, Herman Rosen, Joseph Ramaglia, Norman Padnos, Frank Oliveri, Joseph Miller, Rose Mikaelian, Norman Melbinger, Joseph Mcguire, Jack Ledger, Paul Krasnoff, Ramakrishnared Isanaka, Thomas J. Hook, Michael Greenberg, Stanley Goldstein, Edward Gitkind, Jack Feinstein, Benedetto Fargione, Roy Durig, John Donnellon, Devji Dhebariya, Richard Deraris, Mateo Decardenas, Jose M. Castano, Joseph P. Cassidy, Harold Buchberg, Georgette Boden, Harry Blumenthal, Mirmira Bheemarao, Kirpal Balwani, Betty Aidala, Steven C. Gilbert, J. T. Kerr, Theodore Dinkins Sr, Yourlanges Bonano, Perry Kotzker, Cherre E. Ogden, M. A. Sullivan, P. G. Sladack, Layton Smith, L. Allen, Ella L. Logan, Robert P. McCarthy, Ronald Savitt, Margaret Quinn, James Carr, Mary Ann O'Gorman, K. I. Long, V. Labella, Carol Lenhard, Charles Degaetano, Elsie Colon, Kenneth Brown, Ron Cohen, B. Robotham, Howard Knobler, B. Wilson, W. Schubert, M. C. Cross, Linda Dianto, Dorothy Mcbean, A Mann, R. Regan, Shelia M. Porter, S. Pierre, Pierre, R. Charles, Valentine Koory, J. Giaimo, M Maikish, M. J. Mccann, Martha Dellacamera, Patrick J. Dimotta, Georgia Martinez, Lisa Toslopez, L. A. Riviezzo, Lou A. Riviezzo, Frederick J. Becker, O. Christian, Dominick Degaetano, J. H. Delventhal, D. Grey, W. M. Leask, Patricia Mcdonnell, D. J. Osso, D. R. Stanton, Brian Ward, Aida Pagan, Jean E. Smellie, Surenete Foster, Nancy Guzman, Nancy Brown, Lowell S. Goldberg, Annie Andrews, R. Barbera, I. Castro, Paul M. Maniscalco, N. Graham, P. Carrasquillo, William M. Day, James N. Basile, R. McCracken, Joel Friedman, Z. Goldfarb, Colden Grant, Walter M. Kowalczyk, John Lazzaro, J McNally, Gustave Pappas, Thomas M. Ryan, Mark E. Steffens, R. Cervo, M. Rice, Randall Hirth, Ulysses Grant and P. Hosey.

CITATIONS BELOW

The decision and order of the Court of Appeals is reported at 84 F3d 655 (2d Cir, 1996) (A 3-7).[1] The relevant opinion and order of the District Court is reported at 826 F Supp 736 (SDNY, 1993) (A 8-32). Another opinion and order of the District Court is reported at 865 F Supp 154 (SDNY, 1994) but it addresses no issues relevant to this petition.

JURISDICTION OF THIS COURT

The Court of Appeals' order was issued May 31, 1996 (A 3). There was no petition for rehearing. This Court has jurisdiction under 28 USC section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Tenth Amendment, United States Constitution

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fair Labor Standards Act

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix filed herewith; numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix filed in the Court of Appeals; numbers in parentheses preceded by the letters "SJA" refer to pages in the Supplemental Joint Appendix filed in the Court of Appeals.

is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USC §§ 206, 207] shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act ...) ....

Title 29, Code of Federal Regulations

§ 541.1 Executive.

The term employee employed in a bona fide executive * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the

hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis ....

§ 541.2 Administrative.

The term employee employed in a bona fide * * * administrative * * * capacity in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis ....

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because--

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

§ 541.118 Salary basis

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any work-week in which he performs no work.

* * *

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability ....

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any

amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employees's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

STATEMENT OF THE CASE

Respondents are over 430 managers employed by petitioners the City of New York, the New York City Board of Education or the New York City Health and Hospitals Corporation ("petitioners"). Among the terms of respondents' contracts of employment is the requirement that they work as many hours each week as is necessary to discharge their responsibilities (JA 562, 596, 613). They are paid salaries and fringe benefits but no overtime. Almost all plaintiffs earn annual salaries of over $40,000; many earn annual salaries between $50,000 and $70,000; and some earn annual salaries over $70,000 (JA 521). They sued claiming that petitioners' policies on (a) partial-day absences, (b) court appearances, (c) temporary military leave and (d) disciplinary sanctions are not consistent with the salary basis test and therefore respondents are not exempt employees under the DOL regulations.

See 29 CFR section 541.118(a)(2)-(5) (supra pages 8-9). Respondents do not claim that their duties are not those of exempt employees. See 29 CFR sections 541.1(a)-(e), 541.2(a)-(d) (supra pages 5-7). Assuming that the complaint states a claim upon which relief may be granted, the District Court had jurisdiction under 28 USC section 1331 and 29 USC section 216(b).

Partial-Day Docking: After this Court held that the FLSA constitutionally could be applied to State and local governments, Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528 (1985), DOL received many inquiries from State and local governments about the salary basis test and particularly about the test's provision prohibiting deductions from salary for partial-day absences (as opposed to deductions for absences of a day or more, which are permissible under the salary basis test). 29 CFR section 541.118(a) (supra pages 8-9). These inquiries were caused by the fact that the partial-day docking prohibition was in direct conflict with the principle, applicable to virtually all, if not all, State and local governments, of public accountability, which means that public employees must account for all hours for which they are paid and that public employees must not be paid for time spent not working. See generally Service Employees International Union v. County of San Diego, 60 F3d 1346, 1352 & n.2 (9th Cir, 1995), cert. denied, ___ US ___, 116 S Ct 774 (1996) ("SEIU"); Mueller v. Reich, 54 F3d 438, 442 (7th Cir), cert. filed sub nom. Wisconsin v. Mueller, No. 95-586 (1995); Hilbert v. District of Columbia, 23 F3d 429, 435 (DC Cir, 1994) (Henderson, J, concurring in part and dissenting in part); 57 FR 37667. In New York, article VIII, section 1 of the constitution prohibits the gift of public funds and is understood to mean that public employees may not be paid for time not spent working. Boyd v. Collins, 11 NY2d 228, 234, 228 NYS2d 228 (1962); see Brooklyn Society for Prevention of Cruelty to Children, Inc. v. Blum, 56 NY2d 909, 912, 453 NYS2d 408 (1982); Mullane v. McKenzie, 269 NY 369, 377, 199 NE 624 (1936).

In fact, nothing in the record or respondents' papers herein, nor any judicial decision of which we are aware, names a single State or local government entity that does not operate under the public accountability principle.

DOL responded to the inquiries by letter rulings. A January 15, 1986 letter ruling states that if an employee is docked salary for a partial-day absence caused by illness, the employee would cease to be exempt because of the prohibition on partial-day docking but that the exemption would be lost only in the workweek in which the salary deduction were made, unless such deductions were "regular and recurring," in which case DOL would question whether the exemption should be lost in all workweeks (A 40). A January 9, 1987, letter ruling announced that DOL would follow a nonenforcement policy with respect to partial-day docking, although it noted that employees remained free to claim in lawsuits that their exempt status had been lost because of a salary deduction for part of a day (A 41-42). In that letter ruling DOL expressly recognized that deductions for partial-day absences, were required by the public accountability principle when leave balances had been exhausted and would cause the exemption to be lost because of the prohibition on partial-day docking (A 41). DOL stated that the nonenforcement policy would be followed while DOL gave consideration to proposed changes in the salary basis test (A 41).

In May of 1987, District Courts began issuing decisions in actions brought by State and local employees on the question of whether the exemption is lost where leave balances are used for partial-day absences and no actual salary deduction takes place (see A 30; 865 F Supp at 160 [District Court decision herein] and cases cited therein). Not until September 6, 1991, however, did DOL issue an interim final rule providing that docking for partial-day absences, when no accrued leave is available, will not cause an otherwise exempt employee to lose the exemption. 56 FR 45824 (later codified at 29 CFR section 541.5d) (supra pages 7-8). In issuing the interim final rule, DOL observed that, despite DOL's nonenforcement policy, diverging judicial interpretations of the salary basis test in lawsuits brought by employees had resulted in enormous exposure to public employers for back overtime wages to employees "some of whom would clearly be exempt if duties and amount of compensation alone were examined." 56 FR 45825. DOL recognized that the potential liability "could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the" FLSA. Id. After

discussing the public accountability principle, DOL stated that DOL recognized "that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems." Id.

DOL stated that it, id.:

> has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemptions for bona fide executive, administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

So grave did DOL find the situation facing state and local governments, however, that it issued its new rule as an interim final rule, to take effect immediately without waiting for the normal 30-day comment period and sought to make the new rule retroactive. 56 FR 45824, 45828-30.

On August 19, 1992, DOL issued a final rule revising section 541.5d in respects not relevant here; DOL had decided that its attempt to make its 1991 rulemaking retroactive was invalid. 57 FR 37666. In its accompanying comments, DOL again recognized that the combination of the public accountability principle and the salary basis test effectively prevented any public employee from falling within the managerial exemption (id. at 37667):

> Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt.

DOL stated that it first observed "this anomaly" after Garcia (id.). DOL also stated (id. at 37670):

> [I]t is clear to [DOL], after review of all of the comments [on its September 6, 1991 rule], that certain aspects of the "salary basis" test for distinguishing exempt from

> nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In [DOL's] view, these aspects are not valid indicators of the bona fides of a claimed exemption under section 13(a)(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, [DOL] is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

DOL also stated that it is clear that (57 FR at 37672):

> Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because state and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

Disciplinary Sanctions: The concept underlying the public accountability principle is that public employers are answerable to the taxpayers for their use of public funds, including compensation paid to employees (57 FR 37667; see supra page 10). This principle certainly means that public employees are to properly do

their work and cannot do little work, improper work or engage in improper activities on the job. In other words, the ability of State and local governments to discipline their employees is as central to the public accountability prinicple as is their ability to insist that their employees be paid only for time spent working.

In the disciplinary area, this principle is joined by the principle of progressive discipline, which is that the punishment must not be disproportionate to the offense in light of the employee's disciplinary record. This principle is followed in New York. Pell v. Board of Education, 34 NY2d 222, 234-35, 356 NYS2d 833 (1974); McAvoy v. Ward, 145 AD2d 378, 381, 535 NYS2d 721, 723-24 (1st Dept, 1988), leave to appeal denied, 74 NY2d 606, 544 NYS2d 820 (1989); Hutchinson v. Lloyd, 216 AD2d 3, 627 NYS2d 46 (1st Dept), leave to appeal denied, 86 NY2d 710, 635 NYS2d 947 (1995).

Although in hindsight the conflict between the disciplinary component of the salary basis test, 29 CFR section 541.118(a)(5) (supra page 9), on the one hand, and the progressive discipline and public accountability principles, on the other, seems plain, the fact is that after Garcia everone focussed on the partial-day docking issue and largely overlooked the conflict as to the disciplinary component (see 865 F Supp at 159-60 [District Court opinion herein]). Plaintiffs sued on the partial-day docking component and the District Court rulings were on that issue. On March 29, 1991, DOL issued a letter ruling stating that because an employee need not be paid for any workweek in which the employee performs no work, 29 CFR section 541.118(a) (supra page 8), an otherwise exempt employee suspended without pay for one full week for disciplinary reasons will remain an exempt employee (A 48).

In its promulgation of 29 CFR section 541.5d in 1992, DOL addressed comments it had received about the disciplinary component of the salary basis test. 57 FR 37674. DOL began by noting that the disciplinary provisions were not strictly speaking open for comment during that rulemaking but promised to consider this subject again in proposed revisions to Part 541 "at a later date." Id. Among the comments received by DOL were that public employers have less freedom to terminate employees; that

public employers have virtually no other penalty options besides termination; that suspension for a full week is rarely imposed because of its severity; and that the failure to allow disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees. Id.

DOL's response was that the comments have not provided a sufficient basis for distinguishing between the public and private sectors. Id. DOL stated, id.:

> Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector.

The limitations period in this lawsuit extends back to April 1, 1989. Petitioners' policies at issue in this case were as follows. Respondents were required to use leave balances, and if leave balances were exhausted, to lose salary, for partial-day absences (A 12); thus, the validity of the partial-day docking prohibition before the adoption of 29 CFR section 541.5d is an issue in this case. Respondents were required to use leave balances, and if leave balances were exhausted, to lost salary for court appearances as a witness when they or a relative had a personal interest in the proceeding (A 13). Pursuant to New York Military Law section 242[5], respondents received up to 30 calendar days, or 22 working days, of paid military leave per year and were not required to remit their military pay to petitioners (A 13; see JA 759-66). Cf. 29 CFR section 541.118(a)(4) (supra pages 8-9). Petitioners' disciplinary rules provided that respondents could be disciplined for a variety of infractions that are not violations of safety rules of major significance (JA 527-28). Possible penalties ranged from a reprimand to dismissal and included a fine or suspension (JA 528). There was no set penalty for any infraction (JA 527-28).

DECISIONS BELOW

The parties cross-moved for summary judgment in 1993. The District Court found that petitioners' policies concerning partial-day absences were in conflict with the salary basis test before the adoption of 29 CFR section 541.5d but decided that the Court need not address the significance of section 541.5d because other aspects of petitioners' policies allegedly mandated summary judgment for respondents (A 16-17 & n.8). The Court ruled that because respondents are subject to penalties for infractions of safety rules not of major significance, because they may have to take leave without pay for attending court proceedings in which they or someone related to them has a personal interest, and because petitioners' "limitation on paid military leave [to 30 days per year] presents the potential for employees on temporary military leave to take leave without pay," respondents do not fall within the managerial exemption because they do not meet the salary basis test (A 17-19). See 29 CFR section 541.118(a)(4) & (5) (supra pages 8-9).

The District Court then rejected petitioners' position that in order for the managerial exemption to be lost for a particular employee, an actual deduction from salary must occur. The Court held instead that the fact that a deduction from salary is theoretically possible under petitioners' pay system means that the salary basis test for exemption is not satisfied for every employee covered by that pay system (A 19-23). For brevity, we will refer herein to this as the "actual deduction" issue.

The Court of Appeals affirmed on the District Court's opinion (A 3-7). After noting the split in the federal Courts of Appeals on the actual deduction issue, and relating briefly the contentions of the parties and the rulings of the District Court, The Court of Appeals stated (A 6):

> Though the issues raised are important, no purpose would be served by adding further discussion to the dispute, already fully aired in the conflicting decisions cited above. We agree with the conclusions reached by [the District Court] in [its] comprehensive opinions, and

leave the ultimate resolution of the statutory dispute to the Supreme Court or the Congress.

REASONS TO GRANT WRIT

The issue of the application of the salary basis test to State and local government is one of extraordinary importance, for two reasons. The first is money. For example, the judgment in this case, with attorneys' fees and interest, is now over 14 million dollars (see A 32). But because there may be no class action under the FLSA, 29 USC section 216(a), the City of New York is a defendant in five other similar lawsuits with approximately 5,000 other plaintiffs. A very rough guess is that the City's exposure in those five other lawsuits may be as much as 20 to 25 million dollars.

And that is just one municipal corporation. We are aware of similar lawsuits within the State of New York against the State, the New York City Transit Authority and the Triborough Bridge and Tunnel Authority. For what it is worth, entering "29 CFR 541.118" or its equivalent into LEXIS yields 33 federal Court of Appeals cases and 111 District Court cases since 1985; not all of these are public sector cases but it appears that the overwhelming majority of them are. It would seem that every State or local government entity could be a defendant in such a case. And the financial burden may in fact be greatest on smaller entities, such as towns, villages, small cities and sparsely-populated counties, that do not have the financial reserves to respond in damages if virtually every employee previously thought exempt suddenly were entitled to years of back overtime.

Putting aside the question of back overtime, the salary basis test, as applied herein, leaves State and local governments between the Scylla and Charbdis of making virtually all of their previously-exempt employees hourly employees and of revising their policies to mirror the salary basis test. Making all of their managers hourly employees would be costly; the City of New York estimated, in this lawsuit, that if it were to make all of its managers hourly employees and if each manager were to work two hours of overtime each week, the annual cost to the City would be

60 million dollars. This is a lot of money, even to the Nation's largest city, and especially in these times of flat tax revenue and plummeting State and federal financial assistance, but once again the financial burden may well be greater on smaller governmental entities. This financial burden would be all the more unnecessary because it is undisputed that Congress intended that the managerial exemption be available to State and local governments (infra pages 19-20).

The alternative of revising policies to satisfy the salary basis test is no better. As set forth herein, the salary basis test is arbitrary and capricious and DOL has admitted it (supra pages 11-13; infra pages 28-32). Petitioners revised their policies after the District Court ruled on liability in 1993. The policies now provide that under no circumstances may a manager be docked salary because of a court appearance or temporary military leave, even if all relevant leave balances have been exhausted (JA 1670-71, 1677; SJA 1832-39). This obviously creates the potential for abuse by unscrupulous employees and at least arguably causes petitioners to violate the public accountability principle.

The policies also provide that disciplinary sanctions that would involve a loss of salary, such as a fine or suspension, may not be imposed (SJA 1832, 1834, 1837). Termination and demotion, the only remaining meaningful penalties, are very serious penalties and petitioners are loath to impose them unless they believe that the infraction is equally serious and the Courts will not overturn them under the progressive discipline principle. Because this leaves petitioners with no monetary penalties for less than very serious infractions, petitioners' ability to deter less than very serious infractions is greatly hampered. In addition, a failure by petitioners to take corrective action, such as imposing a disciplinary sanction on a wrongdoer, can be the basis for a lawsuit against petitioners under statutes such as Title VII of the Civil Rights Act of 1964. 42 USC section 2000e et seq. It is thus possible that a sanction too severe under the progressive discipline principle might be considered not sufficient as a corrective measure under Title VII.

The Salary Basis Test Must Be Struck Down

Arbitrary or capricious regulations violate the APA. 5 USC section 706(2)(A). Agency regulations "contrary to constitutional right" or "short of statutory right" also violate the APA. Id. section 706(2)(B) & (C). As a general matter, Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 US 29, 43 (1983):

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

To be arbitrary or capricious agency rules need not be irrational, as an Act of Congress must be in order to be struck down under the due process clause. Id. at 43 n.9.

Certainly, agency rules that are "manifestly contrary" to the relevant statute are to be struck down. E.g., United States v. Strong, 79 F3d 925, 928 (9th Cir, 1996); Brown v. Rock Creek Mining Co., 996 F2d 812, 816 (6th Cir, 1993). Rules must give effect to the unabmbiguously expressed intent of the statute. Northwest Motorcycle Association v. United States Department of Agriculture, 18 F3d 1468, 1471 (9th Cir, 1994). Reviewing Courts must be satisfied that an agency rule does not deviate from or ignore the ascertainable legislative intent. Farmers Union Central Exchange, Inc. v. Federal Energy Regulatory Commission, 734 F2d 1486, 1499 (DC Cir, 1984) (citation omitted).

The 1974 amendments to the FLSA, by which Congress extended the FLSA to all State and local governments, made no change in the managerial exemption. In addition, the Senate committee report refers to the 1974 amendments as extending the FLSA to "five million non-supervisory employees in the public sector," S Rep No 93-690 at 22 (JA 1810), and the House

committee report states that "virtually all non-supervisory employees" in the public sector will be covered, HR Rep No 93-313, reprinted in 1974 USCCAN (2d Sess) at 2837 (quoted at 57 FR 37667); see also 1974 USCCAN (2d Sess) at 2833, 2838. In short, there is no question that Congress intended that supervisors employed by State and local governments would come within the managerial exemption. DOL admits this. 57 FR 37672. Respondents do not dispute it. No Court has ever suggested otherwise.

The problem with the salary basis test, then, is that it was drafted decades ago when the FLSA applied only to the private sector and mostly to industrial positions. 57 FR 37672 n.11. Whatever its merit at that time, it is plain that the salary basis test is arbitrary and capricious and contrary to the intent of Congress now as applied to State and local government because to comply with it would require State and local governments to violate the public accountability and progressive discipline principles.

We do not address the jury duty component of the salary basis test because there is no question that petitioners' policies concerning jury duty always have been consistent with that component.

As to docking for partial-day absences, 29 CFR section 541.118(a)(2) (supra page 8), DOL effectively admitted that it should have permitted docking for partial-day absences the moment the FLSA became applicable to state and local governments (A 38-40, 43-46). 57 FR 37670. DOL's nonenforcement policy, announced in January of 1987, was intended to forestall loss of the managerial exemption on this basis but DOL failed to recognize, or recognized much too late, that the fact that its nonenforcement policy did not bar employee suits meant that the pervasive practice of docking for partial-day absences could lead to immense liability on the part of state and local governments. 56 FR 45824-25. So grave did DOL find the situation when it finally acted that it promulgated section 541.5d, which permits docking for partial-day absences in the public sector (supra pages 7-8), on an emergency basis as an interim final rule, reasoning that State and local governments needed relief so badly that they could not wait for

even a 30-day comment period. 56 FR 45825. DOL even attempted to make section 541.5d retroactive. 56 FR 45828-30.

The Ninth Circuit Court of Appeals found that the prohibition on partial-day docking, that existed before the effective date of section 541.5d, was contrary to Congress's intent and invalid. SEIU, supra, 60 F3d at 1352-53. In fact, the Court, having found that component of the salary basis test invalid, then declared the entire salary basis test invalid prior to the effective date of section 541.5d on the ground that for the Court not to do so would be for the Court to issue its own salary basis test and drafting such a test is for DOL, not the Courts. SEIU, supra, 60 F3d at 1353-54; accord, Balgowan v. State of New Jersey, 84 F3d 656, 660-61 (3d Cir), vacated, ___ F3d ___ (July 9, 1996).

Herein, the lower Courts, by failing to address this issue, effectively ruled that, contrary to SEIU, the partial-day prohibition was not infirm, and the salary basis test was valid, prior to the effective date of section 541.5d. This is a split in the federal Courts of Appeals that this Court must resolve. This issue affects every case where the limitations period began to run before the effective date of section 541.5d.

As to court appearances, the salary basis test requires that deductions may not be made for "attendance as a witness," although in a letter ruling DOL held that attendance not under legal compulsion could be considered an absence for personal reasons and therefore permissible under the salary basis test (A 52). 29 CFR section 541.118(a)(4) (supra pages 8-9). Thus a State or local government would be forced to pay an employee subpoenaed to testify for days even if the employee had a personal interest in the case but had been subpoenaed by any party, including a party with whom the employee was joined in interest. We fail to see how this indicates that the employee is employed in a "bona fide executive [or] administrative ... capacity." 29 USC section 213(a)(1) (supra page 5).

The salary basis test requires that deductions not be made for "temporary military leave," although DOL has held in a letter ruling that after an employee has used up all of the employees'

military leave, absences for military purposes could be considered permissible voluntary absences if the employee had not been ordered to duty (A 51-52). 29 CFR section 541.118(a)(4). The salary basis test's failure to define the word "temporary" renders this component hopelessly ambiguous and the lower Courts herein utterly failed to provide petitioners with any guidance on what "temporary" means.

Moreover, federal statutes require only 14 days of active duty training per year for reservists and 15 days of active duty training for members of the National Guard. 10 USC section 270; 32 USC section 502. As required by New York Military Law section 242[5], petitioners provide every employee with up to 30 calendar days, or 22 working days, of military leave each year but no more. Furthermore, 5 USC section 6323(a)(1) & (b) also limits paid military leave to 22 workdays per year. But herein the District Court, affirmed by the Court of Appeals, found that petitioners' policies on temporary military leave could result in a deduction impermissible under the salary basis test (A 18-19). Something is arbitrary and capricious here and deprives petitioners of the managerial exemption contrary to Congress's intent.

Perhaps most important, and clearly no less arbitrary and capricious, is the disciplinary component of the salary basis test. 29 CFR section 541.118(a)(5) (supra page 9). In terms of making petitioners' argument that this component was drafted with private-sector factories in mind and is outdated and plainly inappropriate to the public sector today, the regulation speaks for itself, addressing as it does rules designed to prevent explosions on the premises. The language of this component clearly implies that deductions in salary as a penalty for an infraction of anything other than a "safety rule of major significance" are not permissible under the salary basis test. It seems to us a dubious proposition that Congress intended employees to be exempt only if their employers refused to impose monetary penalties on them for violations of rules other than safety rules of major significance.

In addition, however, section 541.118(a) provides that "an employee need not be paid for any work-week in which [the employee] performs no work" (supra page 8) and DOL has

interpreted this provision as qualifying the disciplinary component, i.e., an employee may be suspended for an entire work-week, and not paid for that week, without violating the disciplinary component (A 48, 50-51). Thus, according to the disciplinary component, Congress intended that employees could be exempt only if, regardless of the infraction, their employers limited the types of penalties involving loss of salary to termination or suspensions without pay of some whole number of work-weeks. According to DOL, the exemption would not be lost if an employee is suspended for five weeks for stealing a pencil, but would be lost if an employee is suspended for one day, or is suspended for five days but those five days fall in two different work-weeks, for punching his or her supervisor. Congress could not have intended this. It is irrational.

The irrationality of the disciplinary component is made even more clear by considering the disciplinary component together with the other provisions of the salary basis test. It is permissible to deduct half a day's salary if an employee goes to the dentist or a baseball game. However, if an employee is out for half of a day to go to a baseball game but charges the time to sick leave, and is caught, the least serious penalty that the employer may impose that involves money is a suspension of a work-week.

Thus, the irrationality of the disciplinary component seems to us plain in both the private and public sectors, although petitioners are public sector employers and thus are not concerned here with the application of the salary basis test to the private sector. But the irrationality of the disciplinary component is even greater, if that is possible, as applied to the public sector, where because of the public accountability principle supervisors cannot look the other way when employees go to baseball games but charge the time to sick leave and where the progressive discipline principle may well prohibit a one-week suspension for charging four hours to sick leave rather than vacation time.

It is true that DOL considered and rejected changing the disciplinary component, but as DOL explicitly noted, the disciplinary component was not open for comment at the time (supra page 14). In any event, DOL's failure to abolish the

disciplinary component was arbitrary and capricious and contrary to Congress's intent because the disciplinary component, like the rule against docking for partial-day absences, effectively deprives state and local governments of the managerial exemption. When DOL promulgated the final rule in 1992 permitting docking for partial day absences, the statements it made about the salary basis test and the public accountability principle would be equally valid if made about the disciplinary component of the salary basis test and the progressive discipline principle (supra pages 12-13). Furthermore, DOL's comments in declining to abolish or amend the disciplinary component demonstrate that DOL did not know what it was talking about (supra pages 14-15). DOL viewed the problem with terminations to be procedural only but the fact is that the law places substantive limits on the ability of public employers to terminate employees for infractions. For example, in Hutchinson v. Lloyd, supra, 216 AD2d 3, 627 NYS2d 46, the termination of a sanitation worker for an altercation with a civilian was vacated as too harsh.

DOL also observed that other sanctions, such as reprimands, demotions and reassignment or restriction of duties are available (supra page 15). However, demotions and reassignment may well result in loss of salary. More importantly, DOL just missed the point: termination, demotion and even suspension without pay for a week, are severe penalties and "reprimands" and "restriction of duties" are minor penalties, leaving public employers with no options in between.

Most importantly, DOL believed that the question was whether there was a sufficient basis for distinguishing between the public and private sectors (supra page 15). That was not the question. The relevant questions, in light of the public accountability and progressive discipline principles, were: (a) how, indeed whether, the disciplinary component as applied to the public sector helps determine whether an employee is "employed in a bona fide executive [or] administrative capacity" and (b) whether the disciplinary component effectively denies the managerial exemption to state and local governments. The answers are: (a) it does not and (b) it does.

We respectfully submit that the foregoing demonstrates that this Court should grant the petition in order to determine whether the salary basis test should be struck down as arbitrary and capricious and contrary to Congress's intent. But even if this Court determines that that question is not worthy of review, there remains an important question about interpretation of the salary basis test that this Court should address in order to provide important guidance to the lower Courts. That question is whether the salary basis test, strictly speaking, is a "regulation" entitled to substantial deference or an "interpretation" entitled to deference only to the extent that it is "persuasive."

In Skidmore v. Swift & Co., 323 US 134, 140 (1944), this Court held that DOL's "interpretations" of the FLSA assist in discovering Congressional intent only if they evidence thorough consideration and valid reasoning, are consistent with other agency pronouncements and present "all those factors which give it power to persuade." This holding was not overruled by Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 US 837 (1984), which held that legislative-type "regulations" of federal agencies are entitled to deference. Chevron recognized that the judiciary must reject administrative constructions that are contrary to clear congressional intent and that even legislative regulations should not be upheld if they are manifestly contrary to the statute. Id. at 843 n.9, 844.

Indeed, only eight weeks before issuing its decision herein, the Court of Appeals, in a case involving a claim by private-sector exempt employees that they in fact did not satisfy the salary basis test, recognized that DOL's "interpretations" in 29 CFR section 541.302 were "interpretations" and not "regulations" and were entitled to deference only if they were persuasive. Freeman v. National Broadcasting Company, Inc., 80 F3d 78, 83-84 (2d Cir, 1996).

Here, the salary basis test of 29 CFR section 541.118(a), as is 29 CFR section 541.302, which was applied in Freeman, is found within Subpart B of 29 CFR Part 541, which is entitled "Interpretations." (Sections 541.1, 541.2 and 541.5d of 29 CFR are found in Subpart A of 29 CFR Part 541, which is entitled

"General Regulations.") See 29 CFR Sections 500 through 899, revised as of July 1, 1995, at pages 356-57. The District Court herein made no inquiry into the persuasiveness of the salary basis test, citing neither Chevron nor Skidmore, and petitioners argued to the Court of Appeals (as they had to the District Court) that Skidmore and not Chevron applied to the salary basis test but the Court of Appeals affirmed on the District Court's opinion.

Thus, the Court of Appeals's decision herein is in conflict with Skidmore and Freeman. Therefore, even if this Court is not persuaded to grant the petition for the reasons stated above, this Court should grant the petition in order to make clear that Skidmore and not Chevron controls analysis of the salary basis test.

The Tenth Amendment

In National League of Cities v. Usery, 428 US 833 (1976), this Court held that the tenth amendment prohibited application of the FLSA to State and local government employees engaged in traditional governmental functions. In Garcia v. San Antonio Metropolitan Transit Authority, supra, 469 US 528, this Court found the "traditional governmental function" test unworkable, overruled National League of Cities and held that the commerce clause provided sufficient authority for the application of the FLSA to all State and local government employees. In Garcia this Court observed that the States would have to rely on the national political process and their representation in Congress to protect their interests. 469 US at 552-54, 556-57. The dissent in Garcia observed, among other things, that federal administrative agencies cannot be expected to be as knowledgeable about or responsive to State interests as Congress. 469 US at 576-77 & n.18 (Powell, J, dissenting). The majority in Garcia did not address the question of the responsiveness of federal agencies to State concerns.

In South Carolina v. Baker, 485 US 505, 512 (1988), this Court stated:

> Garcia left open the possibility that some extraordinary defects in the national political process might render

congressional regulation of state activities invalid under the Tenth Amendment.

This Court should grant the petition here in order to determine whether DOL's grossly inadequate and snail-like response to the clash, that arose after Garcia effectively applied the FLSA to the States, between the salary basis test and the public accountability and progressive discipline principles, or Congress's failure to do anything about DOL's lethargy, constitutes just such an extraordinary defect in the national political process.

Before reviewing DOL's indefensible response, we note three very significant items. First, it is undisputed that Congress intended that the managerial exemption be available to State and local governments (supra pages 19-20). It is the bureaucracy at DOL that has failed, with one exception, to revise the salary basis test to take account of the public accountability and progressive discipline principles and thus effectively deprived State and local governments of the managerial exemption contrary to Congress's intent and for no rational reason. The action, or rather inaction, of a federal agency is certainly entitled to less weight as an indication of Congressional intent under the commerce clause than an Act of Congress itself. Cf. Seminole Tribe of Florida v. Florida, ___ US ___, ___, 116 S Ct 1114, 1123 (1996) (Congressional intent to subject States to suit in federal Court must be unequivocally expressed).

Second, DOL's denial to the States of the managerial exemption, clearly intrudes on rights of the States protected by the tenth amendment. At the time of the adoption of the constitution and bill of rights the authority of the States to discipline their high-level employees by withholding or reducing their salaries was well-established. See Petition for Writ of Certiorari in Wisconsin v. Mueller, No. 95-586, at pages 20-23.

And third, the City of Baltimore is a defendant in a similar suit, Fraternal Order of Police v. Baltimore City Police Department, No. B-92-1066 (D Md), in which that City submitted expert affidavits that, we respectfully submit, undermine Garcia's idea that the States' representation in Congress will be sufficient to

protect their rights under the tenth amendment. Both experts testified that there has been a dramatic decline in the power of State and local governments in Congress because of the decline in the power of State and local political party organizations at the national level, rule changes, the increased cost of Congressional election campaigns and the rise of national lobbying organizations, which of course contribute to election campaigns while State and local governments do not. One of those experts testified that much real power in decisionmaking has been shifted away from Congress by the expansive delegation of authority to regulatory agencies because these agencies are responsive to their leadership, individual members of Congress (such as the relevant subcommittee chairpersons), organized interest groups and others not directly accountable to the electorate.

The point is that the national political process has failed here primarily because, as the dissent in Garcia feared, Congress's delegation of authority to DOL has resulted in a regulation that even its author DOL admits intrudes on a principle fundamental to State governments.

We now demonstrate that DOL's response to the clash between the salary basis test and the public accountability and progressive discipline principles is an "extraordinary defect in the national political process." This clash was called to DOL's attention immediately after Garcia. In a January 15, 1986 letter ruling DOL stated that an occasional impermissible deduction for a partial-day absence would result in the loss of the managerial exemption only for that employee and only for that work-week (A 40; see also A 45-46). One year later, in a letter ruling dated January 9, 1987, DOL announced a nonsensical nonenforcement policy (A 41-42). DOL stated that while it was considering changes in section 541.118, it would not enforce the prohibition on partial-day docking. This policy was sensible to the extent that, as DOL explicitly recognized in announcing it, deductions for partial-day absences would be required by the public accountability principle but would cause the exemption to be lost (A 41). But it was nonsensical because DOL did not issue a regulation prohibiting suits by employees; not surprisingly, employees brought suits and the District Courts began issuing decisions containing various

rulings on the salary basis test as applied to State and local governments (see A 30; 865 F Supp at 160 [District Court opinion herein]). The Ninth Circuit Court of Appeals described DOL's nonenforcement policy as DOL "punting" to the Courts. SEIU, supra, 60 F3d at 1357.

On January 16, 1987, DOL stated in the Federal Register that it expected to publish a notice of proposed rulemaking concerning 29 CFR Part 541 in 1987. 52 FR 2019. It was not until September 6, 1991, however, that DOL issued an interim final rule and that rule, eventually codified at 29 CFR section 541.5d (supra pages 7-8), addressed only the partial-day docking issue. 56 FR 45824. In issuing the interim final rule, DOL observed that diverging judicial interpretations of the salary basis test in lawsuits brought by employees had resulted in enormous exposure to public employers for back overtime wages to employees "some of whom would clearly be exempt if duties and amount of compensation alone were examined" **(1561)**. 56 FR 45824. In other words, DOL, having punted to the Courts, blamed them for the problems caused by DOL's inaction.

So grave did DOL find the situation facing state and local governments in 1991 that it issued its new rule as an interim final rule, believing that State and local governments should not be forced to wait for the normal 30-day comment period, and sought to make the new rule retroactive. 56 FR 45824, 45828-30. DOL also stated that it, 52 FR 45825:

> has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemptions for bona fide executive, administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

However, to this day DOL has not issued any proposed changes to the salary basis test. In response to an order from this Court in Auer, however, seeking the Solicitor General's views, DOL announced that it henceforth would apply the "actual deduction" interpretation of the salary basis test (infra page 36). It is

unconscionable for DOL to have waited to make this announcement until after four of the federal Courts of Appeals had adopted the "theoretical possibility" interpretation (infra page 34).

What DOL has done instead is issue (a) mind-boggling admissions that the salary basis test is arbitrary and capricious and contrary to Congress's intent as applied to State and local governments and (b) promises to revise the regulations, promises it has not kept. In reissuing the interim final rule as a final rule in August of 1992, DOL stated, among other things, 57 FR 37672:

> In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because state and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

On November 14, 1994 DOL published its "1994 Regulatory Plan" in the Federal Register. DOL stated of its adoption of 29 CFR section 541.5d in 1991, "These revisions were limited in nature and the regulations are still in need of updating and clarification.... [DOL has] conclude[d] that a comprehensive review of these regulations is both necessary and appropriate. The Department intends to solicit input through a public hearing process to identify issues and to develop regulatory proposals." 59 FR 57130. DOL stated further, 59 FR at 57130:

> Because of the limited nature of these revisions, the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employment....

* * *

Because the regulations are sorely out-of-date, a comprehensive rulemaking is necessary. The Department intends to reopen the comment period of the November 1985 advance notice of proposed rulemaking and to obtain additional information pertaining to matters that have arisen subsequently through a hearing process.

Some 23 million employees are within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations and will eliminate this apprehension.

In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s and that they do not readily adapt to contemporary government functions. The Federal Government also has concerns regarding the manner in which the courts and arbitration decisions are applying the exemption to the Federal work force. Resolution of these conflicts over how the regulations are to be applied in the public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable.

For "date" of "ANPRM Second - Hearing Notice," DOL gave, on November 14, 1994, "11/00/94"; for "date" of "NPRM," DOL gave "4/00/95." 59 FR at 57130.

In fact, no advance notice of proposed rulemaking was issued. Rather, in its May 8, 1995 Semiannual Agenda of Regulations, DOL published virtually verbatim what it had published on November 14, 1994. 60 FR 23544-45. However,

DOL dropped, sub silentio, its intention to hold hearings and to issue a second advance notice of proposed rulemaking: in its May 8, 1995 agenda, DOL did not mention dates for hearings or an advance notice of proposed rulemaking. Instead, for "date" of "NPRM" DOL gave "10/00/95." 60 FR 23545.

In fact, no notice of proposed rulemaking was issued. In what plainly will be a semiannual ritual, on November 28, 1995 DOL published its next Statement of Regulatory Priorities. 60 FR 59608. The language concerning the managerial exemption is essentially the same, although it was edited to make it somewhat shorter and DOL tactfully removed the statement that its regulations are "sorely out-of-date." DOL did report, however, "The Department has met with affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed." 60 FR 59613. For "date" of "NPRM" DOL gave "06/00/96."

In keeping with the semi-annual ritual of inactivity, on May 13, 1996 DOL reiterated its usual reiterations about 29 CFR Part 541. 61 FR 23239. For "NPRM" it gave the date of "01/00/97" and for "NPRM Comment Period End," "03/00/97." 61 FR 23240.

It is difficult to imagine a more plain admission by an agency that its regulations are contrary to the statute they are supposed to be interpreting. Furthermore, it is now almost ten years since DOL first explicitly recognized the problem by adopting its nonenforcement policy. Accordingly, this Court should grant the petition to determine whether DOL's inaction violates the tenth amendment.

In the alternative, if this Court does not grant the petition for that reason, this Court should grant the petition to determine whether the tenth amendment requires that the salary basis test be declared contrary to the FLSA and therefore invalid or in the alternative interpreted so as to avoid or minimize its conflict with the public accountability and progressive discipline principles (see infra pages 33-37). In Gregory v. Ashcroft, 501 US 452

(1991), there arguably was a conflict between the federal Age Discrimination in Employment Act ("ADEA") and a State constitutional provision requiring that judges retire at age 70. This Court stated, id. at 461 (quotation marks omitted):

> If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.

This Court therefore looked in the ADEA's provision setting forth who is covered by the Act for a plain statement that judges are covered. Finding none, this Court found no conflict between the ADEA and the State constitutional provision. And in New York v. United States, ___ US ___, ___, 112 S Ct 2408, 2425 (1992) (quotation marks omitted) (citation omitted), this Court stated:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Here, as DOL itself has recognized, because State and local governments operate under the public accountability and progressive discipline principles, the salary basis test effectively deprives State and local governments of the managerial exemption, which Congress plainly intended be available to those governments. Thus, this Court should grant the petition in order to determine whether the salary basis test, as an interpretation of an Act of Congress, should be: (a) struck down because it upsets the usual balance of power between the State and federal governments in purported reliance on a statute that plainly did not intend to do so or (b) interpreted so as to minimize the conflict between the salary basis test and the right of the States to discipline their high-level employees.

This Court Must Address The "Actual Deduction" Issue

The actual deduction issue (see supra page 16) is raised by the petition in Auer v. Robbins, which was granted (supra page i). Thus, even if this Court does not believe that the petition herein should be granted for the foregoing reasons, this Court should at least hold this petition for summary disposition and remand of the case after this Court rules in Auer.

Although the facts of every case are unique, the actual deduction issue has been addressed by nine Courts of Appeals; five have ruled that an actual deduction is required before a violation of the salary basis test is shown and four have ruled that the mere theoretical possibility of a deduction impermissible under the salary basis test is sufficient to violate the test and render non-exempt every employee subject to that theoretical possibility. Requiring an actual deduction are the Fifth, Sixth, Eighth, Ninth and Eleventh Circuit Courts of Appeals. E.g., York v. City of Wichita Falls, 944 F2d 236, 242 (5th Cir, 1991); Michigan Association of Government Employees v. Michigan Department of Corrections, 992 F2d 82, 86 (6th Cir, 1993); Auer v. Robbins, 65 F3d 702, 710 (8th Cir, 1995), petition for cert. granted, No. 95-897 (1996); Barner v. City of Novato, 17 F3d 1256, 1262 (9th Cir, 1994); Atlanta Professional Firefighters Union v. City of Atlanta, 920 F2d 800, 805 (11th Cir, 1991). Finding a theoretical possibility sufficient are the District of Columbia, Second, Seventh and Tenth Circuit Courts of Appeals. E.g., Kinney v. District of Columbia, 994 F2d 6, 11 (DC Cir, 1993); Yourman v. Dinkins, 84 F3d 655 (2d Cir), petition for cert. filed, ___ USLW ___ (1996); Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F2d 279, 286 (7th Cir, 1993); Carpenter v. City and County of Denver, 82 F3d 353, 359 (10th Cir, 1996). The Third Circuit Court of Appeals adopted the theoretical possibility view in Balgowan v. State of New Jersey, 84 F2d 656, 661-63 (3d Cir, 1996), but that decision was vacated on reargument by order dated July 9, 1996 and no new decision has been issued.

We respectfully submit that a more "cert-worthy" split in the Circuits is difficult to imagine. Moreover, we respectfully submit that the view that actual deductions are required plainly is

the far superior view. As to impermissible deductions for Court appearances and temporary military leave, it seems to us nonsensical for the law to be that virtually all City managers must be considered hourly workers when only a tiny fraction of them ever will testify in Court and only a tiny fraction of them are members of the National Guard or Reserves.

However, we submit that the failure of the "theoretical possibility" view, adopted by the District Court and Court of Appeals herein, to render the regulations rational is made even more apparent by the disciplinary component. In this case the only respondent who suffered a salary reduction that was not reimbursed or the result of the settlement of disciplinary charges was an employee who was demoted for two weeks, thus losing $258 in salary, for typing an obscene message, apparently about a female co-worker, on the Emergency Medical Services computer system. Under the view of the lower Courts herein, because of this petitioners must pay over 13 million dollars in back overtime to over 430 employees who apparently never received a disciplinary penalty involving salary and always knew that they were expected to work as many hours as necessary to discharge their responsibilities and whose salaries, in many instances high salaries, were set with the understanding that they would work as many hours as necessary to discharge their responsibilities and would not be paid overtime.

Two other reported decisions also demonstrate the failure of the "theoretical possibility" view as to the disciplinary component. In Avery v. City of Talladega, 24 F3d 1337, 1342 (11th Cir, 1994), a police lieutenant was disciplined for leaving the scene of an apparent suicide. The Court of Appeals held that the managerial exemption thus was lost as to all lieutenants. The Court held that it would be irrational for the exemption to be lost only for the lieutenant in question because that would reward the employee who committed the infraction. Instead, the Court rewarded the employee who committed the infraction and all his fellow lieutenants for the entire limitations period. And in Pautlitz v. City of Naperville, 781 F Supp 1368, 1369, 1372 (ND Ill, 1992), three police sergeants were disciplined for eating sausage sandwiches given to them at no charge at the Naperville Fair. Not

only did they get to keep the sandwiches, but also they and all their fellow sergeants got overtime for the entire limitations period. It is unfortunate for the Naperville lieutenants that no lieutenant was given a sausage sandwich, because in that event all the lieutenants would have received back overtime as well.

We must note that in response to this Court's invitation to the Solicitor General, while the petition for a writ of certiorari was pending, to submit his views on the Auer case, the Solicitor General submitted a brief, on behalf of DOL, in which DOL announced that it adopted the "actual deduction" view and not the "theoretical possibility" view of the salary basis test. In that brief, as it appears on LEXIS, the Solicitor General stated:

> An employee who is otherwise paid on a salaried basis does not lose that status simply because he is theoretically "subject to" an unpaid suspension of less than one week for violating a rule that is not a major-safety rule. Rather, salaried status is lost under the regulations only when employees are "subject to" such a disciplinary suspension as a practical matter. Thus, where no deductions have actually been made, or where there have been only isolated instances in which disciplinary suspensions have occurred, or where suspensions have occurred only under unusual circumstances, employees who are not themselves suspended do not lose their salaried status. Among the factors relevant to determining whether the exemption is lost for employees who are covered by the terms of a manual that on its face permits disciplinary suspensions of less than one week, but who have not been so suspended, are: the number and type of employees covered by the policy, the number of instances of impermissible deductions, and the circumstances surrounding those deductions, e.g. [sic] whether they were idiosyncratic or reflected a more routine use of suspensions of less than one week.

The Solicitor General then noted that in Auer there was evidence of only one impermissible deduction since 1978 and stated, "In those circumstances, it would ignore the realities of [the

employer's] compensation scheme to characterize [the employees] as hourly-paid, rather than salaried, employees."

If this Court agrees with petitioners that the "actual deduction" view should prevail, the question would arise of what the remedy should be for an otherwise-exempt employee who suffers an impermissible deduction. The answer is that the employer should be permitted to use what has been termed the "window of correction" in 29 CFR 541.118(a)(6). The question of use of the window of correction is presented in Auer v. Robbins and we respectfully refer the Court to the petition and brief in opposition to the petition in that case. Thus, the question of the use of the window of correction is another reason why the petition should be granted in this case.

In addition, DOL letter rulings state that in the case of infrequent impermissible deductions the managerial exemption would be lost only for the employee in question and only in the work-week in which the impermissible deduction occurred (A 40, 45-46). See also 57 FR 37669 (quoting unpublished January 17, 1986 letter ruling). This Court should grant the petition herein in order to determine whether this should be the result if this Court determines that the "window of correction" is not available in Auer or the present case.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

PAUL A. CROTTY
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

July 24, 1996

* Attorney of Record.

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OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1537, 1772 -- August Term 1995

Argued: May 1, 1996 Decided: May 31, 1996

Docket Nos. 95-7561, -7610XAP

HAROLD YOURMAN, RALPH BISHOP, WILLIAM H. DWORKIN, FREDERICK EWALD, JOHN L. HENDERICKSON, RICHARD KREPELA, ROBERT P. McCARTHY, FRANK MEYER, ANTHONY PUNZI, and RONALD L. SAVITT, on behalf of themselves and all other employees similarly situated,

Plaintiffs-Appellees-
Cross-Appellants,

v.

DAVID N. DINKINS, as Mayor of the City of New York, the NEW YORK CITY HOUSING AUTHORITY, the BOARD OF EDUCATION OF THE CITY NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants-Appellants-
Cross-Appellees.

Before: NEWMAN, Chief Judge, FEINBERG and OAKES, Circuit Judges.

Appeal and cross-appeal from the May 12, 1995, judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, Judge) determining that municipal employees are entitled to overtime pay.

Affirmed on the opinions of the District Court, Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993); Yourman v. Dinkins, 865 F. Supp. 154 (S.D.N.Y. 1994).

Timothy J. O'Shaughnessy, Office of the Corporation Counsel, New York, N.Y., (Paul A. Crotty, Corporation Counsel, Kristin M. Helmers, Office of the Corporation Counsel, New York, N.Y.; on the brief), for defendants-appellants-cross-appellees.

Edward M. Scher, Asst. Atty. Gen., Albany, N.Y. (Dennis C. Vacco, N.Y. State Atty. Gen., Victoria A. Graffeo, Peter H. Schiff, Office of the N.Y. State Atty. Gen., Albany, N.Y., on the brief), for amici curiae State of New York.

Joan Stern Kiok, New York, N.Y. (Robert N. Felix, New York, N.Y., on the brief), for plaintiffs-appellees-cross-appellants.

(James E. Doyle, Atty. Gen., Richard Briles Moriarty, Asst. Atty. Gen., Wisconsin Dept. of Justice, Madison, WI, submitted a brief for amicus curiae State of Wisconsin).

(Arthur A. Hartinger, Liebert, Cassidy & Frierson, San Francisco, Cal., Louise H. Renne, Jonathan V. Holtzman, Darren W. Lee, City Atty's. Office, San Francisco, Cal., submitted a brief for amici curiae National League of Cities, et al.).

(Richard Schoolman, Brooklyn, N.Y., submitted a brief for amicus curiae New York City Transit Authority).

(Richard E. Casagrande, Lisa M. King, Albany, N.Y., submitted a brief for amicus curiae New York State Public Employees Federation, AFL-CIO).

PER CURIAM:

This appeal presents an issue that continues to divide the federal courts: how to apply in the public sector the Department of Labor's "salary basis" test, which is used to determine whether employees are managers and consequently not covered by the wage and overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1994). Some courts have ruled that the "salary basis" test is not met and employees are therefore protected by FLSA requirements where their pay is subject to reduction, even if no reduction has occurred. See Carpenter v. City & County of Denver, [82 F.3d 353] (10th Cir. 1996); Bankston v. State of Illinois, 60 F.3d 1249, 1253 (7th Cir. 1995); Barner v. City of Novato, 17 F.3d 1256, 1262 (9th Cir. 1994); Kinney v. District of Columbia, 301 U.S. App. D.C. 279, 994 F.2d 6, 11 (D.C. Cir. 1993); Michigan Association of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 86 (6th Cir. 1993). Other courts have ruled that the "salary basis" test is met and employees are therefore exempt from FLSA protections as long as no deductions from compensation have been made. See Auer v. Robbins, 65 F.3d 702, 711 (8th Cir.), petition for cert. filed, 64 U.S.L.W. 3428 (Dec. 7, 1995); McDonnell v. City of Omaha, 999 F.2d 293, 297 (8th Cir. 1993), cert. denied, 127 L. Ed. 2d 538, 114 S. Ct. 1188 (1994); Atlanta Professional Firefighters Union v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).

Appellants, the Mayor of New York City, the City's Board of Education, and its Health and Hospital Corp. (collectively, "the City"), appeal from the May 12, 1995, judgment of the District Court for the Southern District of New York (Loretta A. Preska, Judge), granting relief in the form of overtime pay under the

FLSA to appellees, 435 of the City's supervisory employees ("the employees"). The City contends that the "salary basis" test, as applied to public employers, is irrational and violates the Administrative Procedure Act, 5 U.S.C. §§ 551-596 (1994), and also violates the Tenth Amendment. Alternatively, the City claims that its employees are not "subject to" reduction in pay, a criterion of the "salary basis" test, because (with one small exception), no reductions in pay have actually occurred. The City also claims a defense of good faith under the Portal-to-Portal Act, 29 U.S.C. § 259 (1994). The employees cross-appeal from that portion of the judgment that denied them straight time pay for hours worked between 35 and 40 hours per week.

In a thorough and thoughtful opinion, the District Court ruled that the City's express policies concerning deductions for discipline, court attendance, and temporary military leave placed the employees outside the managerial exemption. The District Court also reasoned that the employees were "subject to" pay reductions based on the express policies, and therefore that the City was liable to all employees in that classification, whether or not the policies had actually been applied. Finally, the District Court rejected the City's contention that the "salary basis" test, as applied, violates the Tenth Amendment and the Administrative Procedure Act, and also rejected the defense of good faith. Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993).

On the employees' cross-appeal, the District Court found in a separate opinion that the employees were not entitled to "gap time" pay because the parties' employment agreement contemplated that the employees' salary would compensate for all hours worked up to the overtime threshold, with a minimum of 35 hours per week. Yourman v. Dinkins, 865 F. Supp. 154 (S.D.N.Y. 1994).

Though the issues raised are important, no purpose would be served by adding further discussion to the dispute, already fully aired in the conflicting decisions cited above. We agree with the conclusions reached by Judge Preska in her comprehensive opinions, and leave the ultimate resolution of the statutory dispute to the Supreme Court or the Congress.

As to both the City's appeal and the employees' cross-appeal, we affirm on the opinions of the District Court.

OPINION AND ORDER OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

YOURMAN, et al.,

Plaintiffs,

- against -

DINKINS, et al.,

Defendants.

----------x

OPINION and ORDER

91 Civ. 2197 (LAP)

APPEARANCES:

JOAN STERN KIOK
120 Broadway, Suite 3305
NewYork, New York 10271
By: JOAN STERN KIOK
ROBERT N. FELIX

Attorneys for Plaintiffs

O. PETER SHERWOOD
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007
By: MARILYN RICHTER
PATRICIA B. MILLER.
Attorneys for Defendants

Loretta A. Preska, U.S.D.J.

Plaintiffs are employees of the City of New York (the "City"), the New York City Health and Hospitals Corporation (the "HHC"), and the Board of Education of the City School District of the City of New York (the "BOE") who have been designated as "managerial" employees by their respective employers. They bring this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 (1988), seeking unpaid overtime compensation at time and one-half their regular rate of pay for all hours worked in excess of forty hours each week. See 29 U.S.C. § 216(b).[1]

Additionally, plaintiffs whose regular work week is thirty-five hours seek overtime compensation at their regular rate of pay for all hours worked between thirty-five and forty hours each week pursuant to Administrative Code of the City of New York § 12-108.[2]

Before the Court are the parties' cross-motions for summary judgment. The Court finds, as each of the parties maintains, that no genuine issue as to any material fact concerning liability exists; the Court's task is therefore to apply the law to the facts before it. See Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992). As to the FLSA claim, the Court finds that plaintiffs are not exempt from the overtime compensation provisions of FLSA and therefore grants plaintiffs' motion and denies defendants' motion as to FLSA liability. As to the state claim, the Court finds that plaintiffs do not meet the requirements of § 12-108 and therefore grants defendants' motion and denies plaintiffs' motion as to that claim. Only the issue of damages under FLSA remains to be settled in this action.

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[1] Plaintiffs also seek liquidated damages and reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 216(b) and declaratory relief pursuant to 28 U.S.C. §§ 2201-02.

[2] The Court has subject matter jurisdiction over this state claim pursuant to 28 U.S.C. § 1367.

I. Defendants' Time and Leave Regulations

Central to this action are the written time and leave regulations applicable to plaintiffs issued by the City ("City Regs."), the HHC ("HHC Regs."), and the BOE ("BOE Regs."). These regulations specify a minimum work week of thirty-five hours, and the City and the BOE regulations expressly require employees to work any additional hours and days necessary to carry out their responsibilities. City Regs. § 3.0; HHC Regs. § 1.0(B)(1); BOE Regs. § 4(a).[3] The regulations do, however, provide some flexibility for employees to vary, with supervisor approval, the hours worked on a given day in order to compensate for unusually long hours worked in a certain period, two weeks for the City and the BOE and one week for the HHC. City Regs. § 3.0; HHC Regs. § 1.0(C)-(D); BOE Regs. § 4(b).

Pursuant to the regulations, employees must maintain time records reflecting their hours worked. City Regs. § 11.1; HHC Regs. § 1.0(A); BOE Regs. § 5; see Defs.' Resp. to Pltfs.' First Reg. for Admis. of Facts ("Defs.' Admis.") No. 10. The impetus for the institution of this action is plaintiffs' failure to receive any credit for time worked beyond the regular work week. See City Regs. § 6.0; BOE Regs. § 10(a).

As will be made clear below, critical to the determination of whether plaintiffs should receive overtime compensation under FLSA is an analysis of the circumstances under which deductions may be made by defendants from plaintiffs' compensation. Leave allowances provided by defendants to plaintiffs are important in this regard.

Plaintiffs accrue between twenty and twenty-seven days of paid annual leave allowance each year which can be used for

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[3] Plaintiffs in uniformed service, e.g., Administrative Fire Marshals and General Superintendents (Sanitation), work forty-hour weeks but are otherwise governed by the same regulations in all respects material to this action. None of the plaintiffs in uniformed service work in the New York City Police Department or in the New York City Correction Department, and the Court makes no findings in regard to employees of those departments in uniformed service.

vacation, personal business, or religious holiday leave. City Regs. § 4; HHC Regs. § 2.1; BOE Regs. § 8. Plaintiffs also accrue twelve days of paid sick leave allowance each year. City Regs. § 5; HHC Regs. § 2.2; BOE Regs. § 9. Use of annual leave allowance and sick leave allowance requires the approval of a supervisor and is measured by the hour for the City and the BOE and by the half-hour for the HHC. City Regs. §§ 4.4, 5.3; HHC Regs. §§ 1.0(B)(3), 2.1(E), 2.2(C); BOE Regs. §§ 8, 9.[4]

Various scenarios exist under the regulations in which defendants may make deductions from plaintiffs' compensation. Employees are most clearly susceptible to pay deductions in instances where they have been absent from work yet have exhausted their leave allowances or have not received approval for use of leave allowances.[5] Additionally, defendants provide for a lump sum payment of unused accrued leave upon separation from employment. City Regs. § 7; HHC Regs. § 8.0; BOE Regs. § 14. Charges made against a leave allowance during employment may then be construed as deductions in pay to the extent any lump sum payment might be reduced accordingly.[6] Furthermore, a deduction

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[4] Additionally, supervisors have discretion to authorize limited use of a leave allowance before it is earned. City Regs. §§ 4.5, 5.4; HHC Regs. §§ 2.1(E), 2.2(C)(3); BOE Regs. §§ 8(f), 9(f). Under certain circumstances, supervisors also have the discretion to grant paid leave to employees who are absent due to personal illness and have exhausted their leave allowances. City Regs. § 5.5; HHC Regs. § 2.2(C)(4); BOE Regs. § 9(g).

[5] "[A] managerial employee could incur a deduction from pay for an absence of less than one work day, but only if the managerial employee has exhausted his or her leave balances. In addition, even if the managerial employee's leave balances are exhausted, the employee could avoid a pay reduction because the employing agency may advance the employee leave time to be earned in the future or may offset longer hours worked on other days during the same pay period." Defs.' Admis. No. 2; see id. No. 7 (similar); see also id. No. 3 (similar for deductions from leave allowance).

[6] While this argument equating charges against a leave allowance with deductions in pay is informative, the Court does not rely upon it to decide the instant motions. Cf. Abshire v. County of Kern, 908 F.2d 483, 487 n.3 (9th Cir. 1990) (declining to address whether employees subject to deductions would be salaried if the deductions were only from leave time and not base pay), cert.

in compensation may occur in connection with the calculation of a lump sum payment if an employee is found to have a negative leave balance upon separation from employment; in such a case, the employee might find her final paycheck reduced accordingly.

A review of defendants' treatment of the following items is particularly useful in evaluating plaintiffs' FLSA claim.

A. Part-Day Docking

As evident from the time and leave regulations, plaintiffs must account for each hour (for employees of the City and the BOE) or half-hour (for employees of the HHC) of their workweek. Plaintiffs basically must allot any such unit of time away from work to their annual leave allowance or sick leave allowance, offset it against unusually long hours worked at another time, or take leave without pay. Plaintiffs cannot, for instance, simply slip away from work for an hour in order to take care of personal business. In fact, the City and the HHC regulations expressly provide for charging unexcused tardiness against an employee's annual leave allowance or treating it as leave without pay. City Regs. § 4.6; HHC Regs. § 1.0(E).[7]

B. Disciplinary Penalties

Plaintiffs are subject to disciplinary penalties, including suspensions without pay of one to four days or deductions from leave balances, for infractions other than those of safety rules of major significance. Defs.' Admis. No. 8. Plaintiffs are subject to penalties for a variety of infractions including, for example, insubordination, abuse of sick leave, refusal to report for drug

denied, 111 S. Ct. 785 (1991). But see Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503, 1510 (S.D. Cal. 1992).

[7] Deductions for tardiness may also be viewed as disciplinary penalties, which are discussed immediately below. See Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279, 286 (7th Cir. 1993); Lacey v. Indiana State Police Dep't, 810 F. Supp. 244, 247 (S.D. Ind. 1992).

testing, conduct unbecoming, theft of agency property, and misuse of an agency car.

C. Court Attendance

Plaintiffs are authorized to attend court with pay and without using their accrued annual leave allowance if neither they nor anyone related to them has a personal interest in the case, the regulations specifically allow for paid leave in order for employees to attend court pursuant to a subpoena or court order. City Regs. § 8.0(c); HHC Regs. § 2.4(C). Thus, if one of the plaintiffs was absent from work in order to testify at a court proceeding in which she or someone related to her had a personal interest, the plaintiff would have to attempt to use her annual leave allowance, attempt to offset the time against unusually long hours worked at another time, or take leave without pay.

D. Military Leave

Plaintiffs may take military leave with pay for twenty-two work days or thirty calendar days each year. N.Y. Mil. Law § 242(5) (McKinney 1990) (incorporated into City Regs. § 8.1, HHC Regs. § 2.4(G), and BOE Regs. § 11). Beyond those periods, however, plaintiffs must seek to use their annual leave allowance, seek to offset the time against unusually long hours worked at another time, or take leave without pay.

II. Actual Deductions

Despite plaintiffs' vulnerability under the time and leave regulations to deductions from pay, actual deductions have rarely been made by defendants. In other words, plaintiffs appear for the most part to use their leave allowances or to account otherwise for absences rather than take leave without pay.

The parties dispute the extent to which deductions from pay have been made by defendants. Defendants contend that only two of the plaintiffs in this action have received such a deduction. The City did not pay John D. Brady for the last eight days of an approximately three-month period in 1991 while he was on active

military duty; Brady had exhausted his annual leave allowance. In addition, the HHC penalized Vito LaBella for misconduct concerning the use of a computer system by, inter alia, deducting $258.00 from his pay.

In contrast, plaintiffs contend that approximately ten of them have received deductions in pay. Given the procedural posture of this matter, I will proceed to review plaintiffs' claims acknowledging only the two deductions in pay identified by defendants. As will be shown, the Court's holding does not depend upon the occurrence of any actual deductions in compensation.

III. The FLSA Claim

A. Overview

Initially, the Court notes that the Supreme Court has found the application of FLSA's overtime requirements to state and local governments to be constitutional. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985). Accordingly, plaintiffs appear at first glance to be entitled to overtime compensation under FLSA at one and one-half their regular rate for hours worked in excess of forty hours each week. 29 U.S.C. § 207(a). Plaintiffs' claim fails, however, if the statutory exemption to FLSA's overtime requirements applies to plaintiffs. 29 U.S.C. § 213(a)(1).

This exemption relieves employers from FLSA's overtime compensation provisions in the case of "any employee employed in a bona fide executive, administrative, or professional capacity as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." 29 U.S.C. § 213(a)(1). Accordingly, the merits of plaintiffs' FLSA claim turn upon whether plaintiffs are "employed in a bona fide executive, administrative, or professional capacity."

Looking to the Department of Labor ("DOL") regulations, "executive," "administrative," and "professional" are defined in a manner such that plaintiffs fall within the exemption if they meet

a duties test and are compensated for their services on a salary basis. See Martin, 949 F.2d at 613; Abshire, 908 F.2d at 484; 29 C.F.R. §§ 541.1-3. The parties have stipulated that the job duties of plaintiffs satisfy the requirements for exemption under § 213(a)(1). Accordingly, the FLSA claim may be reduced to the issue of whether plaintiffs are compensated for their services on a salary basis. If so, then plaintiffs come within the exemption of § 213(a)(1) and their claim under FLSA fails.

Before embarking upon an analysis of whether plaintiffs are paid on a salary basis, the Court notes that the exemption of § 213(a)(1) is to be narrowly construed and that defendants bear the burden of demonstrating that plaintiffs fall within the exemption. See Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 80 S. Ct. 453, 456, (1960); Martin, 949 F.2d at 614.

B. Discussion

According to the DOL regulations,

> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a Predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work. . . .
>
> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. . . .

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

29 C.F.R. § 541.118 (emphasis added).

1. Defendants' Time and Leave Regulations

Inspection of defendants' time and leave regulations in view of the DOL's definition of "salary basis" exposes several issues which persuade the Court that plaintiffs are not compensated on a salary basis. The Court specifically finds that plaintiffs' compensation is "subject to reduction because of variations in the quality or quantity of the work performed."

At the outset, the Court notes that plaintiffs must account for absences from work lasting less than a day as a result of defendants' measurement of a workday in hour or half-hour segments. From this manner of accounting, a plain inconsistency surfaces between the defendants' time and leave regulations and the DOL's definition of "salary basis." The DOL regulations allow deductions for absences from work for a day or more for personal reasons or occasioned by sickness or disability. § 541.118(a)(2)-(3). A deduction for an hour or half-hour absence obviously is not "for a day or more," and the potential for a

deduction from plaintiffs' pay for absences of less than one work day under the defendants' time and leave regulations therefore operates in direct conflict with the DOL regulations.

This variance in defendants' time and leave regulations from the DOL's definition of "salary basis" was recently condoned by new regulations issued by the DOL. These "special provisions applicable to employees of public agencies" allow employees of a public agency, such as plaintiffs, to qualify for the exemption of § 213(a)(1) despite the docking of pay "for absences for personal reasons or because of illness or injury of less than one work-day." 29 C.F.R. § 541.5d. Prior to the promulgation of § 541.5d, the conflict between the defendants' time and leave regulations and the DOL regulations would have signalled that plaintiffs were not compensated on a salary basis. See Martin, 949 F.2d at 615 ("[A]n employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee."); Whitmore v. Port Auth. of New York & New Jersey, 907 F.2d 20, 21 (2d Cir. 1990); Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 652 (2d Cir. 1983); U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986 (the "1986 letter ruling"). In view of § 541.5d, however, the Court does not rely upon defendants' part-day docking of pay in order to disqualify plaintiffs from the exemption.[8]

Putting aside the issue of part-day docking, other obstacles prevent defendants from meeting their burden of proving the

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[8] Notably, if the Court were to rely upon this part-day docking and not proceed to find other support for its finding that plaintiffs are not paid on a salary basis, § 541.5d would not shield defendants from all liability in this action. The part-day docking would be a sufficient basis to disqualify plaintiffs from the exemption under § 213(a)(1) for the relevant period preceding the promulgation of § 541.5d. See Shockley v. City of Newport News, Nos. 92-1790, 92-1800, 1993 WL 217491, at *3 (4th Cir. June 22, 1993); Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 84 (6th Cir. 1993). As the Court finds plaintiffs not to be paid on a salary basis regardless of the part-day docking, dissection of plaintiffs' claims over time in relation to the promulgation of § 541.5d is unnecessary.

exemption under § 213(a)(1).[9] First, plaintiffs are subject to penalties for infractions of safety rules not of major significance. A more direct variance by defendants from the DOL regulations defining "salary basis" is difficult to fathom. See Shockley, 1993 WL 217491, at *5-6; Klein, 990 F.2d at 284-87; Lacey, 810 F. Supp. at 247-48; Service Employees Int'l Union, 784 F. Supp. at 1511; Pautlitz v. City of Naperville, 781 F. Supp. 1368, 1371-72 (N.D. Ill. 1992). Compare Defs.' Admis. No. 8 (admitting possibility of penalties for infractions other than those of safety rules of major significance) and 29 C.F.R. § 541.118(a)(5) (restricting penalties to infractions of safety rules of major significance).[10]

In addition, plaintiffs who are absent from work in order to testify at a court proceeding in which they or someone related to them has a personal interest may have to take leave without pay under the defendants' time and leave regulations. This directly conflicts with the DOL's regulations disallowing deductions from compensation for absences caused by attendance as a witness. 29 C.F.R. § 541.118(a)(4). Similarly, defendants' limitation on paid military leave presents the potential for employees on temporary military leave to take leave without pay; under the DOL

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[9] Section 541.5d only affected reductions for absences of less than one day for personal reasons or due to illness or injury and left "[a]ll other aspects of the salary test . . . unchanged." 57 Fed. Reg. 37671; 57 Fed. Reg. 37673.

[10] When the DOL issued § 541.5d, it explicitly declined to distinguish public employers from private employers in regard to the ability to make pay deductions as penalties under § 541.118(a)(5). 57 Fed. Reg. 37674. The Corporation Counsel for the City of New York, O. Peter Sherwood, acknowledged this distinction in his September 16, 1992 statement before the House of Representatives Committee on Education and Labor Subcommittee on Labor Standards ("Statement"). Statement at 11 ("[Section 541.5d] failed, however, to address the effect of other deductions from pay under the salary basis test, such as a deduction for a disciplinary violation."); cf. Shockley, 1993 WL 217491, at *6 ("The power to reduce an employee's pay [as a disciplinary sanction] for failure to report an absence is inherent in the power to reduce an employee's pay for part-day and full-day absences for personal reasons, both of which were permissible following promulgation of § 541.5d").

regulations, deductions may not be made for absences caused by temporary military leave. Id.[11]

The manifest discrepancies between the defendants' time and leave regulations and the DOL's definition of "salary basis" in regard to penalties and absences for attendance at court proceedings or due to military leave prevent defendants from meeting their burden regarding the exemption under § 213(a)(1).

2. "Subject to Reduction"

Defendants' primary response contends that something more than the theoretical imposition of pay deductions is required in order to disqualify plaintiffs from the exemption under § 213(a)(1), and actual deductions have only been made twice by defendants, in the cases of plaintiffs Brady and LaBella. Defendants would therefore have the Court fashion a standard by which plaintiffs and other public employees would only be prevented from meeting the exemption where there have been actual "regular and recurring" deductions in compensation.

Defendants recognize the existence of two schools of thought regarding whether actual deductions from compensation are necessary prior to finding that employees fall without the § 213(a)(1) exemption. In support of the course exhorted by defendants -- that deductions in compensation must be actual and regular and recurring in order to remove employees from the exemption -- defendants rely upon a line of decisions originating

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[11] Notably, plaintiffs are subject to deductions when they are absent for more or less than a day because of court attendance or military leave. As discussed above, docking of pay for absences of less than a day has been found inconsistent with compensation on a salary basis. See Martin, 949 F.2d at 615; Abshire, 908 F.2d at 486. The caselaw stating this principle appears specifically to concern absences for personal reasons or illness or injury under § 541.118(a)(2)-(3) (expressly allowing absences for "a day or more") and, as already related, has been nullified by § 541.5d as to public employees. As § 541.118(a)(4) addresses absences caused by attendance as a witness and temporary military leave and does not contain any language regarding the duration of the absence, the Court finds the deductions for absences as a witness or due to military leave at issue in this case to conflict with § 541.118(a)(4) regardless of the length of the absence.

outside the Second Circuit and upon an ambiguous paragraph found toward the end of the 1986 letter ruling.

As represented by defendants, courts outside the Second Circuit have held that something more than the possibility of a deduction in compensation is necessary in order to disqualify an employee from the exemption. See Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991) (pay not subject to reduction where no evidence of employees ever suffering reduction in pay); Harris v. District of Columbia, 709 F. Supp. 238, 241 (D.D.C. 1989) (refusing to rely upon "impermissible deductions [which are] less frequent than occasional"); District of Columbia Nurses' Ass'n v. District of Columbia, C.A. 87-1675, 1988 WL 156191, at *2 (D.D.C. January 28, 1988) (employees paid on salary basis where deduction "only in the occasional situation"); see also York v. City of Wichita Falls, Tex., 944 F.2d 236, 242 (5th Cir. 1991) (lack of evidence of docking of pay).[12] Contra Kinney v. District of Columbia, No. 91-7164, 1993 WL 179501 (D.C. Cir. June 1, 1993) (rejecting Harris and District of Columbia Nurses' Ass'n). Furthermore, the argument requiring "more than occasional" deductions appears to spring in part out of language contained in the 1986 letter ruling:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

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[12] Although defendants have cited York, the decision is not inconsistent with the cases reviewed below which favor plaintiffs' position that the existence of a policy of impermissible deductions meets the "subject to reduction" language of § 541.118(a). The York court recognized that it had no evidence before it of either actual deductions or a policy of docking pay. 944 F.2d at 242.

In contrast to these authorities, numerous courts have held that employee compensation is "subject to reduction" under § 541.118(a) if a policy of the employer provides for deductions disallowed by the DOL regulations for salaried employees regardless of whether such deductions have been made. See Kinney, 1993 WL 179501, at *4; Abshire, 908 F.2d at 487; Banks v. City of North Little Rock, 708 F. Supp. 1023, 1025 (E.D. Ark. 1988) (no showing of actual deduction needed); Hawks v. City of Newport News, Va., 707 F. Supp. 212, 215 (E.D. Va. 1988) (employer's policy under attack under FLSA and whether policy has been applied does not alter policy itself); Persons v. City of Gresham, Or., 704 F. Supp. 191, 194 (D. Or. 1988) (immaterial that an instance of actual deduction not alleged); Knecht v. City of Redwood City, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) (lack of actual pay reduction does not alter analysis); see also Shockley, 1993 WL 217491, at *2-6 (focusing upon defendant's policy); Michigan Ass'n of Governmental Employees, 992 F.2d at 85-86 (focusing upon policy but, finding policy ambiguous, looking to application of policy). Moreover, courts have explicitly considered the impact of the enigmatic paragraph in the 1986 letter ruling upon their analysis and, in the opinion of the undersigned, correctly interpreted the 1986 letter ruling so that, although an occasional unpermitted deduction which is inadvertent or unintentional would not change an employee's salary status, the frequency of actual deductions is immaterial to finding employees' compensation "subject to reduction" where the employer has a policy allowing deductions for unpermitted reasons. Abshire, 908 F.2d at 488; Harrison v. District of Columbia, Nos. 87-0809, 87-2275, 88-1028 and 88-3223, 1991 WL 104260 (D.D.C. April 16, 1991); Knecht, 683 F. Supp. at 1311; cf. Banks, 708 F. Supp. at 1024-25 (letter ruling relied upon by defendant but not provided to court). But see Harris, 709 F. Supp. at 241; District of Columbia Nurses' Ass'n, 1988 WL 156191, at *2 n.1. Even if the cited paragraph from the 1986 letter ruling had the significance urged upon the Court by defendants, the "letter ruling cannot override the express provisions of a Department of Labor regulation" in any event. Abshire, 908 F.2d at 488. In my opinion, "subject to reduction" when plainly read does not require actuality but intimates possibility and susceptibility and begs only

the question of whether a policy exists under which a deduction may occur.

Furthermore, unambiguous material generated by the DOL seems to recognize that actual deductions are unnecessary before the exemption is lost. In its promulgation of § 541.5d, the DOL declined the suggestion of one commentator to "alter[] the regulations to require that an actual deduction of pay occur before the exemption is lost." 57 Fed. Reg. 37672. The DOL expressly found that requiring an actual deduction was inconsistent with the appropriate focus upon the pay system at issue. 57 Fed. Reg. 37673.

Despite defendants' presentation to the Court of these two lines of cases in a form suggesting that the issue of how to interpret "subject to reduction" is one of first impression in the Second Circuit, the Court of Appeals for the Second Circuit has unmistakably embraced the reasoning contained in Abshire that employee compensation is "subject to reduction" where a policy exists under which employees may be docked pay even though deductions have not actually been made. Martin, 949 F.2d at 615-17. Given the reliance in Martin upon cases concerning public employees, including Abshire, and the absence of language in Martin distinguishing the treatment under FLSA of private and public employees, I do not view the fact that Martin concerned private employees to make its holding inapplicable here.

Furthermore, I see no basis for distinguishing the proper interpretation of "subject to reduction" under § 541.118(a) depending upon whether a case concerns § 541.118(a)(2)-(3) as in Martin or § 541.118(a)(4) - (5) as in the instant case. Defendants concur on this point. Defs.' Mem. at 21. Notably, precedent exists under § 541.118(a)(5) -- separate from the cases already cited for the Abshire-Martin interpretation of "subject to reduction" -- that whether or not penalties have actually been imposed is immaterial to finding that compensation is "subject to reduction." See Klein, 990 F.2d at 286; Lacey, 810 F. Supp. at 248 n.1; see also Service Employees Int'l Union, 784 F. Supp. at 1511. But see Atlanta Professional Firefighters Union, 920 F.2d at 805 (where no evidence of actual deduction, employee exempt despite

ordinance requiring decrease in compensation for arriving late or violating other regulations).

Finally, it shoud be noted that § 541.5d does not alter the Court's interpretation of "subject to reduction" under § 541.118(a). Although § 541.5d varies the analysis under § 541.118(a) in regard to when public employees' pay may be reduced "for absences for personal reasons or because of illness or injury of less than one work-day" and consequently overrules the holding of Abshire,[13] § 541.5d is silent as to the issue of whether "subject to reduction" requires an actual deduction to occur before an employee is no longer considered salaried under § 541.118(a). Accordingly, the Court disagrees with defendants' contention that § 541.5d overrules the interpretation of "subject to reduction" contained in Abshire and Martin.[14]

In view of the mandate to construe the exemption of § 213(a)(1) strictly, the Court finds that defendants have failed to meet their burden to demonstrate that plaintiffs fall within the exemption. Although § 541.5d prevents plaintiffs from being disqualified from the exemption based upon deductions for absences of less than one day of work, plaintiffs' compensation is "subject to reduction" for penalties not for infractions of safety rules of major significance and for absences caused by attendance as a witness or temporary military leave. Pursuant to § 541.118(a)(4)-(5), these deductions establish that plaintiffs are not paid on a salary basis and therefore are ineligible for the exemption from the overtime compensation provisions of FLSA.

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[13] If Martin had concerned public employees, its holding would also have been overruled by § 541.5d. As to the Second Circuit's decisions in this area, § 541.5d appears to be at variance only with Whitmore.

[14] The DOL is fully cognizant of the division of authority concerning whether "subject to reduction" under § 541.118(a) requires the existence of actual deductions in order to place an employee outside the exemption of § 213(a)(1). See 57 Fed. Reg. 37669. In asking this Court to require actual deductions, defendants in effect encourage the Court to embark upon a course which the DOL has, at least thus far, declined to follow. In view of Martin, the path on which this Court must travel is well-marked.

C. Defenses

Lastly, defendants assert three additional arguments in defense of plaintiffs' claim under FLSA which I shall briefly review.

1. Constitutionality

Defendants posit that Garcia establishes an "undue burden" test. Pursuant to the test put forth by defendants, lower courts are to issue relief where an undue burden exists as a result of failures by the political process to temper the effect of federal statutes upon state and local governments. Defendants' reading of Garcia is somewhat backward. Although the Court explores defendants' argument, the Court recognizes at the outset that its decision merely follows Garcia's holding that the application of FLSA to state and local governments is constitutional.

In Garcia, the Supreme Court found unworkable and inconsistent with established principles of federalism the traditional/nontraditional test which it had previously established in National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465 (1976), for determining state immunity under the Commerce Clause. Although the Supreme Court did discuss in Garcia "the built-in restraints that our system provides through state participation in federal governmental action," 469 U.S. at 556, 105 S. Ct. at 1020, it did not fashion an "undue burden" test or any other test. "Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in Garcia had no occasion to identify or define the defects that might lead to such invalidation." South Carolina v. Baker, 485 U.S. 505, 512, 108 S. Ct. 1355, 1361 (1988).

I perceive absolutely no basis in this matter for finding "extraordinary defects in the national political process" under Garcia-Baker despite defendants' assertion that "the political process has broken down." Defs.' Mem. at 25; see State of New York v. United States, 942 F.2d 114, 119-21 (2d Cir. 1991), aff'd

in part, rev'd in part, 112 S. Ct. 2408 (1992); EEOC v. State of Vermont, 904 F.2d 794, 802 (1990). To the extent that defendants complain about the political process, they focus upon the damages they face in this action – which they view as an undue burden and a result of failures in the political system – without pointing to any substantive defect in the political process itself. In other words, defendants emphasize effect and undue burden while turning a blind eye to cause and defects in the political process.

Having reviewed profuse submissions relating to revisions of the current law regarding the salary basis test, which involve, inter alia, the DOL, Congress, and state and local governments including defendants, it appears to me that the political process has operated proficiently despite the enduring existence of defendants' exposure to liability under FLSA. Indeed, the existence of § 541.5d and the redemption it affords in this very action to defendants' part-day docking policies provides concrete proof of the vitality of the political process. It remains to be seen whether the efforts of defendants and others in the political system can achieve what cannot be attained in this action -- the erasure of defendants' exposure to overtime compensation liability under FLSA in toto.

2. Administrative Procedure Act

Defendants' argument concerning the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 et seq. (1988), is greatly confused. In short, defendants appear to contend that failure to find plaintiffs to be compensated on a salary basis pursuant to § 541.118(a) violates the APA because of congressional intent that public employees qualify for the exemption under § 213(a)(1). Defendants provide no evidence of Congressional intent.[15] Defendants also contend that the DOL

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[15] Defendants seek to infer congressional intent from statements made by the DOL. Rather than delineate congressional intent, these citations illustrate the potential for revision of the DOL regulations as a result of the political process and the fact that grey areas exist as to what categories of employees should be exempt from FLSA's overtime compensation provisions. Cf. Kinney, 1993 WL 179501, at *3 (noting interaction between the DOL regulations and congressional

regulations are arbitrary and capricious in violation of the APA. In sum, defendants' arguments under the APA boil down to a restatement of their contention reviewed above that "subject to reduction" under § 541.118(a) should be interpreted to require actual deductions from employee compensation. Dressed under the APA, defendants' argument still fails.

3. Defendants' Good Faith

Defendants' last defense asserts that they are entitled to a good faith defense under § 10 of the Portal-to-Portal Act (the "Portal Act"), 29 U.S.C. § 259 (1988), which provides that "no employer shall be subject to any liability [under FLSA] if he pleads and proves[16] that the act or omission complained of was in good faith and in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation [of the DOL] or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged."[17]

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intent).

[16] Defendants did assert a Portal Act defense in their answer as an affirmative defense. However, I discern no disputed material fact and find the defense deficient as a matter of law drawing all reasonable inferences against plaintiffs. See Quinn v. New York State Elec. & Gas Corp., 621 F. Supp. 1086, 1089 (N.D.N.Y. 1985) ("summary judgment has been found to be an appropriate tool to dispose of cases involving a Portal-to-Portal Act defense"); see also EEOC v. Home Ins. Co., 672 F.2d 252, 257 (2d Cir. 1982) (summary judgment rarely appropriate where state of mind is material issue); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658 (4th Cir. 1969) (affirming grant of summary judgment for plaintiff where defendant asserted a Portal Act defense).

[17] [T]he Portal Act defense requires the employer to establish three interrelated elements: (1) that its action was taken in reliance on a ruling of the [DOL], (2) that it was in conformity with that ruling, and (3) that it was in good faith.

Home Ins., 672 F.2d at 263; see also 29 C.F.R. § § 790.1-.22 (DOL interpretation of the Portal Act).

Initially, I note that defendants elaborate upon evaluations of FLSA's overtime compensation provisions made by them in the "Citywide Fair Labor Standards Act Committee" and in consultation with internal and outside counsel. Unless connected to a "written administrative regulation, order, ruling, approval, or interpretation" of the DOL, however, these evaluations are irrelevant under the Portal Act. See 29 C.F.R. § 790.13. Similarly, meetings with the DOL have no bearing upon the defense in the absence of a writing by the DOL. Although I have taken these consultations into account in my examination of the written materials upon which defendants claim reliance, I nevertheless find defendants' assertion of a Portal Act defense to fail.

The 1986 letter ruling is the first written material claimed by defendants to support a Portal Act defense in this action. As already discussed, however, this letter ruling does not sustain defendants' time and leave regulations (1) because it does not disqualify public employees from exemption under § 213(a)(1) where the employer has a policy allowing deductions for unpermitted reasons and (2) because the letter ruling in no manner overrides the plain "subject to reduction" language of § 541.118(a). See Abshire, 908 F.2d at 488; see also Harrison, 1991 WL 104260; Knecht, 683 F. Supp. at 1311. Furthermore, even if the 1986 letter ruling is viewed as requiring actual deductions to occur before exemption is lost, the letter ruling concerns deductions made for absences of less than one day and not deductions for court attendance as a witness, temporary military leave, and penalties not for infractions of safety rules of major significance -- the deductions which create the basis for liability in this case.[18]

Defendants also refer to a 1987 DOL letter ruling which stated a DOL nonenforcement policy in regard to deductions from

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[18] Decisions which find that actual deductions are not required in order to disqualify employees from the exemption under § 213(a) have in fact cited the 1986 DOL letter ruling for its holding that deductions for absences of less than a day are disallowed under § 541.118(a)(2)-(3) for salaried employees. Hawks, 707 F. Supp. at 214; Knecht, 683 F. Supp. at 1311.

public employees' compensation made for absences of less than a day for personal reasons or because of illness or accident; this letter ruling reflects part of the genesis of § 541.5d. U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 9, 1987 (the "1987 letter ruling"). As with the 1986 letter ruling, the 1987 letter ruling does not support a Portal Act defense because it does not speak to the types of deductions at issue in this action.[19] In his statement before Congress, the Corporation Counsel of the City of New York explicitly recognized that the 1987 letter ruling does not deal with penalties, attendance as a witness, and temporary military leave. Statement at 9. In addition, the 1987 letter ruling expressly states that it does not shield defendants from suits by employees, such as the instant action. See Kinney, 1993 WL 179501, at *1, *6; see also 57 Fed. Reg. 37668 (noting nonenforcement policy's inapplicability to employees in connection with the Portal Act).

Furthermore, "the Portal Act language, in good faith in conformity with,' precisely links the question of good faith to an act in conformity, and if there is no conformity, general good faith in other respects cannot save the day." Home Ins., 672 F.2d at 265. The material parts of defendants' time and leave regulations were in existence prior to the 1986 letter ruling. Defendants took no action "in conformity with" the 1986 letter ruling or the 1987 letter ruling, except for attempts to determine whether actual deductions had been made under their regulations. If defendants viewed the 1986 letter ruling and the 1987 letter ruling to require actual regular and recurring deductions in compensation before exemption would be lost, affirmative conforming action would be

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[19] Even as to the part-day docking addressed in the 1987 letter ruling, applicability to defendants is doubtful. The 1987 letter ruling, by its terms, applies "only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments [for absences of less than a day]." In their support, defendants cite the New York constitutional prohibition against municipal gifts of money or property to individuals. N.Y. Const. art. VIII, § 1. This constitutional provision does not, however, require defendants to deduct pay from plaintiffs for absences of less than a day. See Abshire, 908 F.2d at 489-90; see also City of Amsterdam v. Local 2825, Amsterdam Professional Firefighters, 494 N.Y.S.2d 180 (N.Y. App. Div. 1985); Taylor v. McGuire, 420 N.Y.S.2d 248 (N.Y. Sup. Ct. 1979).

expected from defendants, such as the issuance of regulations to restrict actual deductions.[20] Especially in view of the fact that neither letter ruling speaks to pay deductions for penalties, court attendance, or military leave, it is clear that defendants could not have relied upon the letter rulings for the maintenance of the time and leave regulations. See 29 C.F.R. § 790.14(b) (lack of conformity where employer assumes irrelevancy of varied circumstances).

Defendants essentially contend that they should not be found liable because of the flux surrounding FLSA's overtime compensation provisions for public employees after Garcia. The fundamental problem with this argument is that it effectively blocks public employees such as plaintiffs from receiving relief under FLSA until the political process irons out all of the wrinkles caused by the application of FLSA to public employees. Any uncertainty resulting from these political travails cannot form the basis for a portal Act defense.

> The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. Vol. 93, Part 4, Cong. Rec. 4390.

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[20] In Service Employees Int'l Union, defendant amended its ordinance so that "salaried" employees would not be subject to docking for periods of absence of less than one day. 784 F. Supp. at 1510. Plaintiffs have submitted evidence demonstrating a similar measure by the New York City Transit Authority. Kiok Decl. Ex. D. Obviously, this precise concern has been ameliorated by § 541.5d, but similar amendments could cure the other impermissible deductions in defendants' regulations. For instance, in Klein, defendant amended its disciplinary procedures so that no pay deductions would occur other than for infractions of safety rules of major significance. 990 F.2d at 282.

Quinn, 621 F. Supp. at 1091 (citing legislative history in connection with 29 C.F.R. § 790.15(a)).

Moreover, the shifting waters regarding FLSA's applicability to public employees post-Garcia have not been unnavigable. The first decision to require actual deductions in compensation for liability under FLSA, of which the Court is aware, was the 1988 decision District of Columbia Nurses' Ass'n; Knecht, issued in 1987, was the first decision, of which the Court is aware, to find that the absence of an actual deduction did not preclude FLSA liability. In view of the fact that defendants' time and leave regulations provided for the imposition of deductions in compensation prior to these decisions, defendants should not have merely stayed their course but should have shifted direction so that actual deductions would not be made until the debate was settled. See Kinney, 1993 WL 179501, at *6 ("split in judicial decisions" not reasonable basis for defendant's policy); 29 C.F.R. 790.17(h) (regulation, order, ruling, approval, or interpretation relied upon by employee must be valid at time of reliance).

In sum, plaintiffs should not be subject to a cut in pay because of defendants' misgivings about the political process. The Portal Act was not designed to protect defendants under the circumstances before the Court.

> Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.

29 C.F.R. § 790.2(a). Defendants' course of relief lies with the political process and/or modification of their time and leave

regulations; plaintiffs' course of relief lies with this action against defendants.[21]

IV. State Claim

As previously stated, plaintiffs' state claim asserts that plaintiffs whose regular workweek is thirty-five hours should receive overtime compensation at their regular rate of pay for all hours worked between thirty-five and forty hours each week pursuant to Administrative Code § 12-108.[22] Plaintiffs, however, point to no "statute, general, special or local" establishing thirty-five hours each week as "the maximum number of hours of employment;" accordingly, plaintiffs' state claim fails. I find plaintiffs' contention that § 12-108 can only reasonably be construed to provide overtime compensation for hours worked beyond an employee's regular workweek to be disingenuous in view of the unambiguous language of the statute. Cf. Corp v. Alexander, 460 N.Y.S.2d 674 (N.Y. App. Div. 1983) (plaintiff not fireman with statutory maximum of hours per year that maybe worked).

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[21] Another district court recently summarized the situation quite succinctly:

> This area of the law is currently churning, and federal courts issue often contradictory opinions on a daily basis. [Section 541.5d] only begins to address the types of problems faced by local governments because of their negligence (or unwillingness) to bring their policies into line with the FLSA, but we decline to extend the reach of [§ 541.5d's] forgiveness too far beyond its language. At some point public sector employers must be held to answer for their conduct.

Pautlitz, 781 F. Supp. at 1374.

[22] Notwithstanding the provisions of any other statute, general, special or local, the mayor may authorize the head of any agency to require any officer or employee in such agency or any class or group of officers or employees in such agency to work in excess of the maximum number of hours of employment prescribed for such officer or employee or class or group of officers or employees by any statute, general, special or local, provided that each such officer or employee shall be paid overtime compensation for such work at not less than his or her regular basic pay rate.

V. Conclusion

The Court finds that plaintiffs are entitled to unpaid overtime compensation for all hours worked in excess of forty hours each week under FLSA. The exemption under § 213(a)(1) does not apply to plaintiffs because they are not compensated on a salary basis according to the DOL regulations and controlling caselaw. This finding emanates from the defendants' time and leave regulations which subject plaintiffs' compensation to reduction for absences caused by attendance as a witness and by temporary military leave and for penalties not for infractions of safety rules of major significance. Plaintiffs' state claim fails because plaintiffs have failed to identify any statute which sets thirty-five hours each week as the maximum number of hours of employment.

Counsel for the parties shall appear at a conference before the Court on August 5, 1993 at 4:30 p.m. in order to address how to proceed in regard to the damage phase of this action.

SO ORDERED.

Dated: New York, New York
July 12, 1993

/s Loretta A. Preska
Loretta A. Preska, U.S.D.J.

JUDGMENT

U.S. DISTRICT COURT
FILED
MAY 12, 1995
S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD YOURMAN, ET. AL.,

Plaintiffs,

- against -

DAVID N. DINKINS, as Mayor of the City of New York, the NEW YORK CITY HOUSING AUTHORITY, the BOARD OF EDUCATION OF THE CITY SHCOOL DISTRICT OF THE CITY OF NEW YORK, and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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91 Civ. 2197 (LAP)

JUDGMENT

This action came on for hearing before the Court, Honorable Loretta A. Preska, District Judge presiding, and the issues having been duly heard pursuant to cross-motions for

summary judgment, and opinions and orders on said cross-motions having been duly rendered on July 12, 1993 and October 6, 1994,

It is Ordered and Adjudged that the plaintiffs recover of the defendant City of New York, the sum of $10,656,349.18; that the plaintiffs recover of the defendant New York City Health and Hospitals Corporation, the sum of $2,573,677.80; that the plaintiffs recover of defendant Board of Education of the City School District of the City of New York, the sum of $76,896.88, in accordance with the amounts specified for each individual plaintiff named on the annexed list of individual plaintiffs; that the plaintiffs recover all amounts plus post judgment interest as provided by law, plus reasonable attorneys' fees and the costs of this action as provided in 29 U.S.C. § 216 (b).

Dated: New York, New York
May 9, 1995

/s Loretta A Preska
Loretta A. Preska
United States District Judge

DISTRICT COURT'S DENIAL OF RECONSIDERATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD YOURMAN, RALPH BISHOP, WILLIAM DWORKIN, FREDERICK EWALD, JOHN L. HENDERICKSON, RICHARD KREPLELA, ROBERT P. MCCARTHY, FRANK MEYER, ANTHONY PUNZI, and RONALD L. SAVITT, on behalf of themselves and all other employees similarly situated,

Plaintiffs,

- against -

DAVID N. DINKINS, as Mayor of the City of New York, the NEW YORK CITY HOUSING AUTHORITY, the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

ORAL ARGUMENT REQUESTED

DEFENDANTS' NOTICE OF MOTION FOR RECONSIDERATION AND TO VACATE THE JUDGMENT PURSUANT TO RULES 59 AND 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

91 Civ. 2197 (LAP)

PLEASE TAKE NOTICE that upon all the prior pleadings and proceedings had herein, defendants will move this Court at Room 12A, United States Courthouse, Southern District of New York, 500 Pearl Street, New York, N.Y., on the 26th day of June, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order vacating the final judgment in favor of plaintiffs pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure on the grounds that there has been an intervening change in the applicable law warranting reconsideration by this Court of its final judgment; vacatur of that judgment; and, entering a judgment in favor of defendants, and for such other and further relief as the Court deems just and proper

Dated: New York, New York
May 26, 1995

PAUL A. CROTTY
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 2-167
New York, New York 10007
(212) 788-0876

By: /s PBM
PATRICIA B. MILLER (PM0186)
Assistant Corporation Counsel

TO: Joan Stern Kiok
Attorney for Plaintiffs
26 Broadway, 24th Floor
New York, N.Y. 10004-1898
(212) 747-1414

MEMO ENDORSED

the motion is denied in all respects.

SO ORDERED

/s Loretta A Preska
LORETTA A. PRESKA
UNITED STATES DISTRICT JUDGE

October 5, 1995

JANUARY 15, 1986 LETTER RULING

Letter Ruling: January 15, 1986 (no number assigned)

This is in response to your letter of July 30, with enclosure, in which you request our opinion as to whether ___ Counties, in the State of ___ are compensating their salaried employees "on a salary basis" that is in accordance with the salary requirement contained in section 541.118 of Regulations, 29 CFR Part 541. You specifically want to know whether, under section 541.118, deductions may be made from the salaries of such employees for absences of less than a day. We regret the delay in responding to your inquiry.

Your letter states that in ___ counties virtually all employees are paid on a salary basis. The employees earn sick leave under the sick leave plans of those counties, and use the sick leave on the basis of the hours they work. In a telephone conversation with a member of my staff on October 20, you clarified your inquiry by stating that you request our opinion with regard to the salary basis of payment for employees who would otherwise qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) as bona fide executive, administrative, or professional employees.

You state that where a salaried employee has accrued sufficient sick leave credits and, for example, misses four hours of scheduled work because of illness, the employee is charged for four hours of sick leave and his or her compensation is not affected. However, if such employee has exhausted all earned sick leave and misses four hours of scheduled work because of illness, the employee is docked for the four hours and his or her pay is reduced accordingly. You indicate that it may not be possible under ___ State law to advance sick leave to employees. You believe that other States have similar problems in paying such employees their full salaries when they work partial days.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive administrative, or professional capacity as those terms are defined in the appropriate sections of Regulations, 29 CFR Part 541. One requirement for exemption is that the employee be paid "on a salary basis" as discussed in section 541.118.

Deductions which may be made from an employee's compensation without affecting the employee's salary basis of payment are found in sections 541.118(a)(2), (3), and (5). Deductions from the salary of an otherwise exempt employee which would affect the salary basis of payment are found in sections 541.118(a)(1) and (4).

As stated in section 541.118(a)(2), deductions may be made from the salary of an exempt employee when the employee is absent from work for a day or more days for personal reasons, other than sickness or accident. As stated in section 541.118(a)(3), deductions may also be made for absences of a day or more days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy, or practice provides compensation for such absences, deductions for absences of a day or more days may be made before an employee has qualified under such plan, policy, or made before an employee has qualified under such plan, policy, or practice and after the employee has exhausted the leave allowance thereunder. However, deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3).

Therefore, in the example you provide where the employee is docked four hours and his or her pay is reduced accordingly, because the employee has exhausted his or her sick leave, the employee would not meet the criteria under 29 CFR Part 541 for exemption under section 13(a)(1) of FLSA.

Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

The Fair Labor Standards Amendments of 1985 (Public Law 99-150), which were enacted on November 13, 1985, change certain provisions of FLSA as they relate to employees of State and local governments. The amendments will be effective on April 15, 1986. Prior to that date, the Department of Labor (the Department) will issue regulations as may be required to implement this legislation. We have enclosed a summary of these amendments for your information.

We also wish to point out that on November 19 the Department published an Advance Notice of Proposed Rulemaking in the Federal Register (50 FR 47696) to obtain the views of the public on needed changes in Regulations, 29 CFR Part 541. The Department is interested in the views of the public with respect to all aspects of the regulations. Comments will be received until January 21, 1986.

We trust the above information will be of assistance to you.

Sincerely,

/s/ Herbert J. Cohen
Deputy Administrator

JANUARY 9, 1987 LETTER RULING

Letter Ruling: January 9, 1987 (no number assigned)

It has come to our attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in section 541.118 or 2 CFR Part 541. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued, or has exhausted, paid leave time, such employee is paid only for hours actually worked in accordance with applicable State or local law. This practice is similar to the practice applicable to Federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis which is contrary to the position in section 541.118 that deductions may be made only for absence(s) of a day or longer.

Revisions to the provisions of 29 CFR Part 541, including the salary tests have been under consideration as indicated in the Advance Notice of Proposed Rulemaking (ANPR) published in the Federal Register on November 19, 1985 (50 FR 4769). The ANPR was published in order to obtain the views of the public on needed changes in the regulations. A commentor representing public employers has pointed out the problem described above and has proposed changes in section 541.118 that would allow deductions to be made for absence(s) or less than a day, or to eliminate the salary test entirely.

While consideration is being given to proposed changes in the regulations, a nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees. Wage-Hour will not deny an exemption under section 13(a)(1) to an otherwise exempt public employee whose pay is reduced by deductions from absence(s) of less than a day for

personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s).

This nonenforcement policy will be followed only where the public employer can show that a provision contained in applicable State or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) of the type described above which are not covered by available paid leave. This nonenforcement policy is not intended to affect any employee's rights under section 16(b) of FLSA.

If you have any questions concerning the above policy, please contact OPO, Branch of FLSA enforcement, at FTS 523-7043.

/s/ Paula V. Smith
Administrator

JULY 17, 1987 LETTER RULING

Letter Ruling: July 17, 1987 (no number assigned)

This is in response to your letter of May 26 enclosing correspondence from ___ Secretary of the State of ___ Department of Employment Relations. ___ is specifically concerned with the application of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) to bona fide administrative and professional employees employed by the State of ___.

___ asks to what extent the State of ___ can require exempt administrative and professional employees, when they participate in collective bargaining activities, to substitute paid or unpaid leave for the time spent in such activities without affecting their status as exempt salaried employees. ___ states that it has generally been the position of the State of ___ that its employees who are members of their unit's bargaining team must cover time spent in bargaining during their normal working hours with paid leave time (i.e., vacation, compensatory time, etc.) or leave without pay. Bargaining sessions commonly take place over a period of a normal workday, but there are times in which the bargaining may last only a portion of a workday. In addition, bargaining sessions may last several days at a time but may not last a full workweek.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under FLSA must be paid a minimum of $3.35 per hour and overtime pay of not less than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek, unless specifically exempt.

Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in Regulations, 29 CFR Part 541, a copy

of which is enclosed. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the regulations.

It is our general position that time spent in union negotiations is hours worked for purposes of FLSA if the time occurs during regular working hours (section 785.42 of Interpretative Bulletin, 29 CFR Part 785, copy enclosed). Where time spent in union activities is to be counted as hours worked under FLSA, deductions from the salaries of bona fide administrative or professional employees would be inconsistent with the salary basis of payment and may not be made without defeating the exemption. Where the time spent in such activities during the employee's absence from productive work is not counted as worktime for the employer, deductions for such absences would come within the intent of the rule explained in section 541.118(a)(2) of the regulations which provides that deductions may be made when an employee absents himself or herself from work for a day or more (days) for personal reasons other than sickness or accident. Deductions for absences of less than a day, however, are not permitted under the regulations for any reason.

Based on the above, your constituents's questions are answered in the order presented in his letter.

Q.1

To what extent may an employer require an exempt administrative or professional employee who chooses to engage in collective bargaining activities during the workday to substitute a partial day's paid leave or unpaid leave (i.e., a salary deduction) for the time spent in such activities without the employee losing his or her exempt status?

A.1

Generally, deductions for absences of less than a day are not permitted under the regulations for any reason. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week. In the case of State or local government employees, deductions may be made for absences of less than a day for personal reasons if the conditions outlined in the enclosed memorandum of January 9, 1987, are met.

Q.2

To what extent may an employer require an exempt administrative or professional employee who chooses to engage in collective bargaining activities, such as contract negotiations, to substitute a full day or more (days) of paid or unpaid leave (i.e., a salary deduction of a full day or more (days) for a full day or more (days) spent in such activities) without the employee losing his or her exempt status?

A.2

Where the time spent in collective bargaining activities during the employee's absence from productive work is not counted as hours worked under FLSA, deductions for such absences would be permissible from the salary of an otherwise exempt employee for a full day or more (days) without the employee losing the exemption for that week.

Where such time is counted as hours worked under FLSA, deductions from the salary of an otherwise exempt employee for a full day or more (days) would be inconsistent with the employee's exempt status and may not be made without defeating the exemption. However, an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week.

Q.3

To what extent may an employer pay an administrative or professional employee on an hourly basis rather than a salary basis during the workweeks in which the employee chooses to engage in collective bargaining activities and pay the employee on a salary basis for all other workweeks without losing the employee's exempt status during the workweeks in which the employee is paid on a salary basis? ___ states to assume that the employee engages in collective bargaining activities for approximately 7 weeks over a 2-year period and that the employee would be paid as a nonexempt employee during these workweeks.

A.3

An employer may pay an otherwise exempt employee on an hourly basis rather than on a salary basis during workweeks in which the employee chooses to engage in collective bargaining activities.

It is our opinion that, although the employee would be considered a nonexempt employee during those weeks when paid on an hourly rate basis, it would not affect the employee's exempt status in other weeks when the employee is paid on a salary basis.

It should be noted that it is also our position that an employee whose salary is computed on an hourly rate basis will be considered as employed "on a salary basis" if he or she is guaranteed a salary which is at least equal to the salary prescribed in the appropriate section of Regulations, Part 541, and if there is a reasonable relationship among the hourly rate, the regular or normal working hours, and the amount of the weekly guarantee.

MARCH 29, 1991 LETTER RULING

Letter Ruling: March 29, 1991 (no number assigned)

This is in reply to your letter requesting an opinion as to whether certain deductions from the salaries of Registered Nurses (RNs) would defeat the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

You state that your client is a hospital and in conformity with the provisions of a collective bargaining agreement (CBA), the RNs are considered to be salaried professional employees within the meaning of section 541.3 of Regulations, 29 CFR Part 541. You further state that the employees are paid biweekly, and that the hospital does not make deductions from their salaries for absences of less than one day in accordance with section 541.118 of the regulations. However, the CBA permits suspension without pay from one to five days should the RNs violate the hospital's or the State's rules governing health care employees. These rules address concerns of patient well-being, safety, and job performance. The rules require safe and competent performance of assigned duties as well as prompt and regular attendance when the RNs are scheduled for work.

In light of the above, you ask the following questions:

Q.1

May the hospital suspend a RN for disciplinary reasons without pay for one full week notwithstanding payment of a salary on a biweekly basis without affecting the employee's exempt status?

A.1

Section 13(a)(1) of FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative or professional capacity as those terms are defined in the appropriate section of the regulations. An employee may qualify as a bona fide professional employee if all the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.3 of the regulations, are met. One such test contained in section 541.118 of the regulations requires that an otherwise exempt employee be paid on a salary basis.

Section 541.118(a) states, in part, that an employee need not be paid for any workweek in which he or she performs no work. Therefore, the answer to your first question is in the affirmative.

Q.2

May the hospital suspend an RN without pay for disciplinary reasons for periods of less than one week but for one or more full days without affecting the employee's exempt status?

A.2

Deductions which may be made from an employee's compensation without affecting his or her exempt "salaried" status are found in section 541.118(a)(2), (3), and (5) of the regulations. The only disciplinary type of deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." As explained in section 541.118(a)(5), safety rules of major significance embrace those intended to prevent serious danger to the workplace or to other employees, including smoking in explosive plants, oil refineries, and coal mines. This has also been construed to cover industrial security regulations promulgated by a government agency.

Disciplinary deductions made from the salary of an RN for violating rules relating to patient well-being and job performance

are not the type of deductions that would be permitted by section 541.118(a)(5) of the regulations. There is not enough information in your letter for us to determine if a violation of the hospital's or the State's safety rules are the type of "safety rules of major significance" for which disciplinary deductions may be made without affecting the exempt status of an employee.

Q.3

See our answer to question 2.

We trust that the above is responsive to your inquiry. If you have any further questions on this matter please do not hesitate to let us know.

/s/ John R. Fraser
Acting Administrator

DECEMBER 2, 1993 LETTER RULING

DEC -2 1993

Mr. E. Carl Uehlein, Jr.
Morgan, Lewis & Bockius
Counselors at Law
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Uehlein:

This is in response to your letter requesting an opinion as to whether the proposed pay-docking and disciplinary policies for salaried employees who qualify for the minimum wage and overtime pay exemption is in compliance with the provisions of section 541.118 of Regulations, 29 CFR Part 541. You state that your client is planning to issue a clarification of its policy which would permit workweek long disciplinary suspensions of exempt employees for reasons not necessarily constituting infractions of safety rules of major significance.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined in Regulations, Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as described in the appropriate section of the Regulations, are met. One such test contained in section 541.118 of the Regulations requires that an otherwise exempt employee be paid on a salary basis.

The questions you raised are answered in the order presented in your letter.

Q.1. You ask whether your client's plan to issue a policy which would permit workweek long disciplinary suspensions of exempt employees for reasons not necessarily constituting

infractions of safety rules of major significance is permissible under the FLSA.

A.1. It would be permissibie to suspend an employee for an entire week without pay and not defeat the exemption, since section 541.118(a) states, in part, that an employee need not be paid for any workweek in which he or she performs no work.

Q.2. You ask whether your client's proposed modification of its military leave policy to not compensate an employee for workweeks in which he or she undertakes no work for the employer because of military leave taken in excess of the authority's twenty-one day military leave in excess of the authority's twenty-one day military leave policy, where such absences result from order by military authorities for further training relating to the employee's military duties is in compliance.

A.2. Section 541.118(a)(4) of the Regulations states that deductions may not be made for absences of the employee on temporary military leave, although the employer may offset any amounts received by the employee as military pay for a part of the week against the salary due for that particular week without loss of the exemption. However, in any workweek in which the employee performs no work for the employer, the employer need not pay the employee any part of his or her salary.

Q.3. You also ask whether your client can treat voluntary military leave as "personal, voluntary" leave and not compensate exempt employees for days missed in excess of the twenty-one days allowed, where such days are taken as military leave without the express order or requirement of the employee's military duties.

A.3. There is nothing in the FLSA or the Regulations, Part 541, to prevent an employer from designating voluntary military leave as "personal, voluntary" leave and not compensable for days missed in excess of the twenty-one days allowed,

where such days are taken as military leave without express order or requirement of the employee's military duties.

Q.4. Finally, you ask whether your client can implement a policy to dock the pay of exempt employees who are absent from work for one or more full days for the purpose of taking part in Court proceedings where the employees are not under statutory or other legal compulsion to be present in Court (such as time spent on jury duty or under subpoena).

A.4. Section 541.118(a)(4) of the Regulations states that deductions may not be made for absences of the employee caused by jury duty or attendance as a witness, although the employer may offset any amounts received by the employee as jury or witness fees for a part of the week against the salary due for that particular week without loss of the exemption. However, it is our opinion that absences from work to attend Court proceedings where the employee is under no legal compulsion to be present in Court are absences for personal reasons. Deductions from an employee's salary may be made when the employee absents him or herself from work for a day or more for such personal reasons.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement

or order applying, or requiring compliance with the provisions of the FLSA.

Sincerely,

/s/ Maria Echaveste
Administrator

Supreme Court, U.S.
FILED
AUG 26 1996
CLERK

(2)

No. 96-152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RUDOLPH W. GIULIANI,
as Mayor of the City of New York, *et al.*,

Petitioners,

vs.

HAROLD YOURMAN, *et al., etc.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOAN STERN KIOK
Counsel of Record
Attorney for Respondents
26 Broadway — 24th Floor
New York, New York 10004
(212) 747-1414

ROBERT N. FELIX
Of Counsel

46 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should *certiorari* be granted where the opinion of the Court of Appeals is not in conflict with any opinion of this Court, and is not in conflict with any of the opinions of a sister court of appeals?

2. Should *certiorari* be granted where the factual pattern of this case is significantly different from the facts of *Auer v. Robbins* in which this Court has granted *certiorari* (No. 95-897)?

3. Should *certiorari* be granted to determine if the DOL salary basis test regulation, promulgated after rule-making procedures in accordance with the Administrative Procedure Act, is entitled to *Chevron* deference?

4. Should *certiorari* be granted to determine if the Tenth Amendment is violated simply because the remaining portions of the salary basis test require public employers, like private employers, to make no deductions from salaries of exempt employees in any week in which they perform any work without regard to the number of days worked?

5. Should *certiorari* be granted to determine if an employer may claim an exemption from the provisions of the FLSA, where the employer has an express policy permitting reductions in pay for otherwise exempt employees for disciplinary infractions, court attendance and military leave and has even confirmed such policy by making actual deductions?

ADDITIONAL STATUTORY PROVISIONS

In addition to the statutory and regulatory provisions set forth in the Petition, the following sections of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, *et seq.* are relevant:

Sec. 203. Definitions

As used in this chapter -

* * *

(d) "Employer" includes . . . a public agency . . .

* * *

(x) "Public agency" means . . . the government of a state or political subdivision thereof . . .

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STATEMENT OF THE CASE

The Findings of the District Court

The City's[1] statement of the case is misleading in a number of ways. Most important, contrary to the City's assertions,

[1] For clarity, petitioners (the Mayor of the City of New York, the New York City Board of Education and the New York City Health and Hospitals Corporation) will be referred to collectively as "the City", or where

(Footnote continued)

(Pet. 10-15)[2], the issue of part-day docking is not before this Court. This case was originally brought because the City was violating four distinct provisions of the "salary basis" test, 29 C.F.R. §541.118(a) - part-day docking, disciplinary penalties, court attendance and military leave - by subjecting employees to deductions from their salaries in weeks that they performed work. The plaintiffs thus could not qualify for the FLSA exemption otherwise available for white-collar employees. Plaintiffs did not sue simply on the part-day docking component; nor were the District Court's rulings only on that issue[3] (Pet. 14). The District Court specifically refrained from relying on the City's failure to comply with the part-day docking component, relying instead on the City's deviations from the test in connection with disciplinary penalties, court attendance and military leave (A 17-19).[4]

Although the District Court found a "plain inconsistency" between the City's time and leave regulations and the DOL's definition of "salary basis" (A 16), the District Court did "not rely upon defendants' part-day docking of pay in order to disqualify plaintiffs from the exemption", since the promulgation of 29 C.F.R. §541.5d had eliminated the part-day docking component after September, 1991 (A 17). Moreover, the District Court found that if it were to rely only on part-day docking, such finding would not shield the City from all liability since it would be sufficient to disqualify the employees from the exemption for the period prior to the promulgation

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appropriate, "the defendants." Respondents will be referred to as "the employees" or "the plaintiffs" as the context requires.

[2] Pet. followed by a number refers to pages in the Petition.

[3] We refer extensively to the opinion of the District Court (A 8-37) because the Court of Appeals affirmed on the opinions of the District Court (A 7).

[4] "A" followed by a number refers to pages in the appendix to the Petition. "JA" refers to pages in the Joint Appendix. "SA" refers to pages in the supplemental appendix. "RA" refers to pages in the respondents' appendix which are annexed to this brief.

of §541.5d. However, as the District Court found "plaintiffs not to be paid on a salary basis regardless of the part-day docking, dissection of plaintiffs' claims over time in relation to the promulgation of §542.5d" was unnecessary (A 17, fn. 8).

As to the City's policies on disciplinary penalties the District Court stated that "[a] more direct variance by defendants from the DOL regulations defining 'salary basis' is difficult to fathom." (A 18). The City admits and the District Court found that plaintiffs were "subject to disciplinary penalties, including suspensions without pay of one to four days ... for infractions other than those of safety rules of major significance. Defs. Admis. No. 8." (Pet. 15, A 12, JA 223). Those infractions include insubordination, abuse of sick leave, refusal to report for drug testing, conduct unbecoming, theft of agency property, and misuse of an agency car (A 12-13).

Although defendants formally admitted that they had actually imposed such penalties "on extremely rare occasions" (JA 224), discovery involving discipline of managers in three New York City agencies showed 14 instances of disciplinary actions against managers, five of which involved fines or suspensions (JA 243-52). In the District Court defendants argued that only two pay deductions had taken place, one for disciplinary reasons and the other in connection with military leave (A 13-14). The District Court found it unnecessary to decide the precise number of actual deductions because "the Court's holding does not depend upon the occurrence of any actual deductions in compensation." (A 14).

The District Court also found that the City's time and leave policies subjected the employees to deductions if they attended court proceedings in which the employee or a relative had a personal interest and if they took more than 22 work days for military leave.[5] The District Court found that both of

[5] There is no conflict among the circuit courts over the court attendance and military leave components of the salary basis test. Nor does the City make a persuasive case that these provisions make the salary basis test

(Footnote continued)

these policies directly conflict with the DOL regulations and concluded that "[t]he manifest discrepancies between the defendants' time and leave regulations and the DOL's definition of 'salary basis' in regard to penalties and absences for attendance at court proceedings or due to military leave prevent defendants from meeting their burden regarding the exemption under § 213(a)(1)." (A 19).

The City's Statement of the Case (Pet. 11) is also misleading in its representation of the DOL's position as to the other facets of the salary basis test. DOL's January, 1987 nonenforcement policy (A 41-42) only refers to nonenforcement of the part-day docking provision of the salary basis test. It specifically states that DOL will not deny an exemption to an *otherwise exempt* public employee whose pay is reduced because of absences of less than a day. It makes no reference to employees whose pay is reduced because of disciplinary infractions, military leave or court attendance and subsequent letter rulings make clear that exemptions would be lost if deductions were made for those reasons (A 48, 51-2, JA 357, RA 4-6).

Having found that the defendants' policies were inconsistent with the regulations of the DOL, the District Court addressed the issue of whether actual deductions from pay are needed for an employer to lose the white collar exemption or whether the fact that its employees are "subject to" such reductions is enough. Defendants argued there, as they do here, that such reductions must be regular and recurring in order to remove employees from the exemption. After a thorough review of the case law in this area, the District Court found that actual deductions were unnecessary because:

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irrational or that they violate public accountability. (Pet. 21-22) Certainly if public accountability is not implicated where the City grants 22 days of military leave as it does here, the fact that a few more days of paid military leave might be required because the employee is called up for service during a week in which he performs work does not make the DOL rule irrational.

• "Subject to reduction" when plainly read does not require actuality but intimates possibility and susceptibility and begs only the question of whether a policy exists under which a deduction may occur. (A 21-22)

• Unambiguous material generated by DOL seems to recognize that actual deductions are unnecessary before the exemption is lost. (A 22)

• The Second Circuit, in *Martin v. Malcolm Pirnie*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992), had unmistakably embraced the reasoning contained in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991). (A 22)

• There is no basis for distinguishing the proper interpretation of "subject to reduction" depending on whether the case involves §541.118(a)(2)-(3) or (4)-(5).[6] (A 22)

• The new §541.5d did not overrule the interpretation of "subject to reduction" contained in *Abshire* and *Martin*. (A 23)

• Exemptions under the FLSA must be construed strictly. (A 23)

The City's 1993 Rule Changes

In September and October, 1993, following the District Court's finding that defendants were not exempt under the FLSA because of the discrepancies in their time and leave and disciplinary policies, defendants amended their rules to conform to the requirements of the salary basis test.[7] The memorandum, from the New York City Personnel Director to

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[6] Sections 541.118(a)(2)-(3) relate to part-day docking; §§(a)(4) and (5) relate to court attendance, military leave and disciplinary penalties. See Pet. 8-9 for complete salary basis test.

[7] The City's changes are appended to this brief at RA-1 to 3. The New York City Board of Education and New York Health and Hospitals Corporation made similar changes. (SA 1834-39)

agency heads, stated that the changes in regulations and policies affecting civilian and uniformed managers were being made "so that the City will be in conformance with the requirements for exemption from the overtime provisions of the Fair Labor Standards Act" as set forth by the District Court in this case. (RA 1) The changes provided that:

• Docking of pay or leave and suspension without pay and fines were prohibited, except for infractions of safety rules of major significance.

• Pay-docking in connection with a 30-day suspension while disciplinary charges were pending was prohibited.

• Docking of pay for temporary military leave was prohibited.

• Docking of pay for attendance as a witness was prohibited.

• Unexcused tardiness was required to be charged first to annual leave balances before docking pay.

Similar changes were made by the other two defendants. Although the first two changes were unnecessarily broad, going well beyond the §541.118(a) requirements that an exempt employee's pay not be reduced "in any week in which he performs any work", defendants are unable to point to any incidence in which the new changes have interfered with their ability to properly manage and discipline their employees.[8] Indeed, they continue to maintain that discipline of otherwise exempt employees is very rare (Pet. 35).

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[8] Defendants had an opportunity to point to any such incident when they made their post-judgment motion for rehearing almost two years following the change in rules (A 35-37).

REASONS FOR DENYING THE WRIT

I

THIS CASE DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE

The City has not demonstrated that the issues raised in the Petition are of such national importance that the Court must step in to resolve them. The revised salary test, i.e. §541.118(a) as modified by §541.5d, has cured any perceived deficiencies. Further clarifications or changes, if any, should be left to the administrative rulemaking process after notice and comment, or to Congress. *See*, *Cook v. Hudson*, 429 U.S. 165 (1976); *Sanks v. Georgia* 401, U.S. 144, 151 (1971) "...[I]t has always been a matter of fundamental principle with this Court...[to] exercise [its] powers of judicial review only as a matter of necessity." (holding that an intervening change in the statute eliminated the need for the Court to decide the issue because it was unlikely that the issue would arise again, at least in the same context.)

The fact that the City is liable for paying a large money judgment is not a sufficient reason for this Court to grant the Writ (Pet. 17)[9]. If paying overtime pay in compliance with the law costs public employers a substantial amount of money because more white-collar employees than expected are covered by the overtime provisions of the FLSA, the employers need only change their rules to fit into the requirements of the salary basis test. The many public employers, including the City of New York, that have changed their disciplinary and other policies without adverse consequences and are now able to lawfully claim the exemption attests to the ease with which

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[9] Although the City claims the judgment is now over $14 million, the actual back overtime pay award is approximately $6½ million which was doubled by the District Court's award of liquidated damages pursuant to FLSA § 216(b), based on the City's failure to show that its actions were "objectively reasonable". *Yourman v. Dinkins*, 865 F.Supp. 154, 163 (S.D.N.Y 1994).

liability can be avoided.[10] If the changes in policies are really so distasteful as the City claims, the public employers can continue to seek legislative amendments to the FLSA or more changes in the DOL Rules. As discussed more fully in the section under the Tenth Amendment, the political process has worked well for the City by relieving it of continuing liability for part-day docking. What the City really wants is simply to be relieved of the liability it incurred while violating explicit provisions of the FLSA and the Rules. That is not a reason for granting a Writ.

The City also seeks to have the salary basis test declared invalid as applied to the public sector. But any determination of invalidity would relate only to the period prior to September 1991, the period prior to the DOL's amendment of the salary basis test that eliminated part-day docking as one of the criteria for determining exemptions. Because of the applicable Statute of Limitations (two years), no case filed today can relate back prior to 1994. Portal-to-Portal Act of 1947, 61 Stat. 84, as amended 29 U.S.C. § 255(a). Since the City amended its rules in 1993 to comply with the salary basis test, no new cases could have been brought after September, 1995. The issue is therefore undeserving of the Court's attention.

In the following pages we will demonstrate that the City's Petition raises no legitimate constitutional issues or important federal statutory issues, and that there is no real conflict among the courts of appeals on the "subject to" question warranting this Court's intervention.

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[10] See fn. 15, p. 19 below.

II

THE PERCEIVED CONFLICT AMONG THE CIRCUITS ON THE SUBJECT TO/ACTUAL DEDUCTION ISSUE IS MORE APPARENT THAN REAL. IN ANY EVENT, THE EMPLOYEES IN THIS CASE HAD ACTUAL REDUCTIONS IN THEIR COMPENSATION. THEREFORE THE COURT SHOULD NOT GRANT THE WRIT.

A. *There Is No Real Conflict Among the Circuits*

The Second Circuit stated that the "issue that continues to divide the federal courts [is] [h]ow to apply in the public sector the Department of Labor's 'salary basis' test, which is used to determine whether employees are managers and consequently not covered by the wage and overtime provisions of the Fair Labor Standards Act. . ." (A 5).

Because of the precise wording of the salary basis regulation (29 C.F.R. 541.118(a)), there can be no reasonable dispute that the "subject to" standard is the most faithful interpretation and the only one that makes any sense. Any other interpretation would be unworkable and impractical, because of the uncertainty that would exist as to how to apply the test. *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), demonstrates why a literal reading of the salary basis regulation is essential. There, the Court stated:

> Subjecting an employee's pay to deductions ...is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" [and administrative and professional employees] requires that an employee's predetermined pay not be "subject to reduction

> because of variations in the . . . quantity of work performed"

A close examination of the Courts of Appeals' decisions in this area reveal that there is more consensus and less of a conflict than might appear at first glance. The Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits, all look to see if there is an actual policy subjecting salaried employees to deductions. *See*, for example, *Yourman v. Dinkins*, 84 F.3d 655, (2d Cir. 1996), *pet. for cert. filed*, __ U.S.L.W. (1996), No. 96-152; *Martin v. Malcolm Pirnie*, 949 F.2d 611, 615 (2d Cir. 1991), *cert denied*, 113 S.Ct. 298 (1992); *Balgowan v. State of New Jersey*, 84 F.3d 656 (3d Cir.), *vacated on other grounds*, 84 F.3d 667 (July 9, 1996); *Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993); *Michigan Ass'n of Government Employees v. Department of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *pet. for cert. filed*, 64 U.S.L.W. 3297 (Oct. 10, 1995); *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995); *Klein v. Rush Presbyterian*, 990 F.2d 279 (7th Cir. 1993); *McGuire v. City of Portland*, ___ F.3d ___, 1996 WL 431720 (9th Cir. 1996); *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991); *Carpenter v. City & County of Denver*, 82 F.3d 353 (10th Cir. 1996), *pet. for cert. filed*, 65 U.S.L.W. 3017 (June 28, 1996); *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993). While in the Sixth and Ninth Circuits, the courts of appeals will look to the presence of actual deductions if there is any uncertainty or ambiguity in the employer policy, actual deductions are not otherwise needed in the above jurisdictions, except to illustrate that the policy exists.

Although the Eleventh Circuit has held that pay is not "subject to reduction" where there is no evidence of employees ever suffering reductions in pay, (*Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991)), the circuit has subsequently made clear what evidence it needs to deny the exemption. Thus, one impermissible disciplinary deduction pursuant to an express

employer policy is enough to make the entire subject class of employees, non-exempt. *Avery v. City of Talladega*, 24 F.3d 1337, 1342 (11th Cir. 1994). Although the City lists in its Petition the Fifth Circuit as a circuit requiring actual deductions, that court simply "recognized that it had no evidence before it of either actual deductions *or* a policy of docking pay." (A 20). *York v. City of Wichita Falls*, Tex., 944 F.2d. 236, 242 (5th Cir. 1991).

In the Eighth Circuit, a public sector employer that expressly subjects its salaried employees to impermissible deductions, does not lose the § 13(a)(1) exemption, despite the unambiguous language of 29 C.F.R. 541.118(a). *Auer v. Robbins*, 65 F.3d at 702, 710-711 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (June 24, 1996); *McDonnell v. City of Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994). The Eighth Circuit is apparently unwilling to apply the salary basis test to the *public* sector at all. Instead, by judicial fiat, it has invented conditions relating to the salary basis test which, in effect, bestow on public employers an impenetrable § 13(a)(1) exemption and which leave the public employees in that Circuit without a claim when it comes to overtime compensation.

This, of course, is contrary to this Court's holdings that exemptions under the Act are to be strictly and narrowly construed and that employers have a heavy burden to satisfy their claim for the exemption. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy and Assoc.*, 358 U.S. 207, 211 (1959); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, (1974).

Although there was an actual deduction in *Auer*, the Court of Appeals did not find a loss of exemption because it found the circumstances unique and not pursuant to established policy. *Auer*, at 710-711. In this case we have no unique circumstances and an established policy. Therefore, whatever determination the Court makes in *Auer* will not impact on the decision in this case. Accordingly, the Court should not delay denial of the Petition pending a decision in *Auer*.

B. *There Were Actual Deductions in this Case*

Although there are actual deductions in this case, the District Court stated that its "holding does not depend upon the occurrence of any actual deduction in compensation." (A 14). Thus, the employees in this case are not dependent on a finding that a policy without actuals is insufficient to cause the loss of the exemption. This case differs from *Auer* in at least two important respects. Here, there was an express policy and the disciplinary deductions were not made under unique circumstances but directly pursuant to the City's policy.

To the extent that the City implies that there was only one impermissible disciplinary deduction in the class of managers subject to the disciplinary policy, it is misleading this Court. The City has chosen to exclude plaintiffs who were reimbursed or received their ultimate penalty as a result of the settlement of disciplinary charges. Further, the City ignores similarly situated managers who received disciplinary penalties but did not opt-in as plaintiffs in this case. The fact of their actual discipline and actual deduction is no less real than any other actual deduction. The City's history is that discipline is not merely theoretical. Since the City admitted that the whole class of managers were subject to penalties that would violate the salary basis test, the exact amount of disciplinary penalties is not relevant and were not fully tallied up.[11] *See McGuire, supra* ___F.3d. ___, 1996 WL 431720 at

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[11] The record shows that in a small agency such as the Fire Department, during the period 1989 through 1991 alone, there were six disciplinary cases of civilian managers, and in three cases, the penalty was docking of pay (JA 243-248). Another small agency, Housing Preservation and Development, disciplined three managers between 1989 and 1991, two of whom were fined and one lost five days annual leave (JA 250). In the Human Resources Administration, at least five managerial employees were disciplined during the period 1989-92. Three were demoted, one had charges pending for AWOL and the fifth was reprimanded (JA 252). In the Department of Sanitation, a uniformed manager was suspended for four days in 1991 for violation of sick leave policy. Another was disciplined in 1986 for failure to report to the clinic when ordered. A third was brought up on charges and received a reprimand, although under

(Footnote continued)

p.1, (awarding judgment to plaintiffs while noting that "[n]o battalion chief has ever suffered such a reduction, but other city employees subject to the policy have been suspended without pay for disciplinary reasons.")

The City had express policies in three areas that could, and in some cases, did lead to impermissible deductions. These policies, if not individually, then certainly in the aggregate, give every indication that the managerial employees are in fact non-exempt and offer no hint to the contrary.

The City, on page 36 of the Petition, makes much of the Solicitor General's *amicus* brief, which was submitted in *Auer* on behalf of the DOL and in opposition to the *certiorari* petition. Aside from the lack of appropriateness of citing as authority an *amicus* brief filed in another case which was factually very different from this case, the DOL's position in that brief is murky at best but in any event provides little help to the City's case. Deductions are not theoretical in this case. All have been intentionally imposed and the entire class of managerial employees was subject to these deductions in the same way that hourly non-exempt City employees are subject to deductions under similar policies. The deductions involved in this case can hardly be called "isolated" or "occur[ing] only under unusual circumstances" (Pet. 36). The deductions in this case occurred because the City had express policies permitting the deductions.

To the extent that the DOL was attempting in *Auer* to make a change in interpretation of its own rules without the benefit of the rulemaking process, it has achieved little in the way of clarity. Moreover, an *amicus* brief which runs contrary to the

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command discipline the agency had sought a one to three day suspension without pay (JA 456,239). Deposition witnesses indicated they knew of other instances of discipline for managers (JA 239, 382-84, 393, 424-26, 468).

wording of DOL's own regulations and previous letter rulings[12] cannot substitute for rulemaking.

In sum, all but one of the circuits uniformly interpret the salary basis regulation consistent with its language. The sole circuit that breaks from these ranks - the Eighth - is having its case reviewed by this Court.[13]

III

THE SALARY BASIS TEST IS A VALID EXERCISE OF THE RULEMAKING AUTHORITY OF THE SECRETARY OF LABOR

A. *There is No Conflict in the Circuits*

The City asserts that this Court should address the issue of the validity of the salary basis test as applied to the public sector. However, the Second Circuit, in affirming the District Court's opinion, did not discuss the validity issue. Nor did it refer to any conflict among the circuits on the validity issue. In fact, there is no conflict worthy of the Court's attention to grant the Writ. The District Court found no evidence that the salary basis test contravened congressional intent and summarily disposed of the City's argument that the salary test was irrational and violative of the Administrative Procedure Act

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[12] "Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g. because of an employer's policy), we would question whether such employees, including all of those in the 'class' or 'category' of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in *all* workweeks." U.S. Department of Labor, Wage and Hour Division, Letter Ruling of December 24, 1991 (RA 5); "...[W]e wish to emphasize that disciplinary deductions ... are permissible *only* for the reasons cited in [the Letter Ruling of December 24, 1991]. . . We continue to believe that employees may be appropriately disciplined in other ways." U.S. Department of Labor, Wage and Hour Division, Letter Ruling of March 30, 1994. (RA 4)

[13] The suggestion (Pet. 37) that the window of correction would be available to the City in this case was not raised or argued before the District Court.

("APA") 5 U.S.C. § 551 *et seq.* characterizing their argument as "greatly confused". In fact, the District Court saw the City's presentation, not as an APA or validity argument at all, but as "a restatement of their contention . . .that 'subject to reduction' under § 541.118(a) should be interpreted to require actual deductions from employee compensation", an argument that the District Court had already discussed and rejected (A 25-26).

Since the Department of Labor amended the salary basis test in September 1991, by eliminating the prohibition against part-day docking only in the public sector, no courts of appeals have found the revised salary test to be invalid. Thus, there is no conflict at all concerning the revised salary regulation.

Furthermore, although two circuits, the Third and Ninth, found the entire pre-September 1991 salary basis test to be invalid as applied to the public sector, the only real concern that these courts had with the *old* salary test was the part-day docking component, which is not at issue here. *See, Balgowan v. State of New Jersey*, 84 F.3d 656 (3d Cir.), *vacated on other grounds*, 84 F.3d 667 (July 9, 1996); *Service Employees International Union ("SEIU"), Local 102, et al. v. County of San Diego*, 60 F.3d 1346, 1353 (9th Cir. 1994) (Order, Supp. Opinion 1995), *cert. denied*, 64 U.S.L.W. 3479, 3484 (1996) ("[t]he 1992 regulation properly amends the salary test as applied to the public sector, so that the salary test now takes into account long-standing and reasonable state and local ordinances predicated on public accountability."); *McGuire v. City of Portland*, ___ F.3d ___, 1996 WL 431720 at p. 3 (9th Cir. 1996) (directly addressing the validity of the disciplinary component and explicitly finding it and the entire revised salary basis test valid).

In sum, no courts of appeals have held that any component of the salary basis test, other than the part-day docking component, is invalid on account of public accountability principles, progressive discipline principles or anything else.

B. *The Disciplinary Component Does Not Contravene Public Accountability Or Progressive Discipline Principles*

Contrary to the City's assertions, there is a rational basis in using the disciplinary component to determine whether an employee is employed in a bona fide executive or administrative capacity. Such employees are expected to work all hours that are necessary to perform their tasks. Since these individuals will not be receiving any overtime compensation for the long hours they are expected to work, the trade-off is that their salary will not be reduced because of the quantity and quality of their work in weeks in which they perform work.

There is nothing irrational about a salaried employee, who is expected to work long hours or as many hours as are necessary, not being subject to pay deductions because she has to testify for a few days in court, be called for military duty in the middle of a week or is suspended for a minor disciplinary infraction. Unlike hourly employees, salaried employees get paid by the week. If they do not get their full pay, they are simply not salaried. *See*, *Abshire v. County of Kern*, 908 F.2d at 486 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991); *Martin v. Malcolm Pirnie*, 949 F.2d at 615. Indeed, the lead plaintiff in this case, supposedly a salaried managerial employee, had $6.25 deducted from his salary for overstaying his lunch hour on one day. (JA 212-216, 484).

The City's Statement of the Case is misleading in its presentation of how the disciplinary, military leave and court attendance components of the salary basis test impact uniquely on public employers (Pet. 13-15). The City argues that despite the elimination of the part-day docking component of the salary basis test, the various remaining components are irrational and thus violative of the APA (Pet. 19-24). The salary basis test has existed for more than 50 years. It has periodically been revised by DOL, most recently in 1992. 29 C.F.R.§ 541.5d. While there may be other acceptable ways to define a truly salaried employees, the DOL's definition has stood the test of time and the City is unable to state any persuasive

reasons why this Court should make second class citizens out of public employees.

The City cites no authority for the proposition that public accountability principles are implicated by a prohibition on fines of exempt employees or suspensions for less than one week periods. Public accountability is rooted in the notion "that governmental employees should not be paid for time not worked, and that there is need to be accountable to the taxpayers for the expenditure of public funds." 56 Fed.Reg. at 45825. Since employees who are subject to disciplinary deductions are not paid while not working, no issue of public accountability is presented.

The City criticizes as absurd or irrational those court decisions that have found one deduction for a disciplinary infraction to be sufficient for an employer to lose its exemption for all similarly situated employees. (Pet. 35-36). The City suggests that only the offending employee should lose the exemption and then only for that week.(Pet. 37)[14] That makes no sense at all. If an employee is disciplined with a three day suspension, is there a chance he will work more than 40 hours that week or that the employer will give him sufficient overtime to make up for his suspension? Of course not.

There is nothing problematical about applying the disciplinary element of the salary basis test to public employees. *McGuire*, *supra*, 1996 WL 431720 at p. 3, ("the city has provided no sound basis for its claim that public accountability requires it to have more liberal disciplinary powers than private employers"). In *Mueller v. Reich*, *supra*, 54 F.3d at 442-43, the court upheld the application of the revised salary basis test to public employees, ruling that the public employer's articulated policy of imposing unpaid suspensions was inconsistent with §541.118(a)(5). The court found that the entire

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[14] No court of appeals has ruled that this is the appropriate remedy for violation of the salary basis test.

plaintiff class was entitled to overtime compensation in accordance with the mandates of the FLSA.

Furthermore, the principle of progressive discipline is not compromised. Nor is that principle unique to the public sector. On the contrary, the principle is derived from the concept of "just cause" for disciplinary action, which in turn is derived from the private sector. *See* Elkouri and Elkouri, *How Arbitration Works*, Ch. 15, (4th ed. 1985). The disciplinary component of the salary basis test neither deprives the City of the § 13(a)(1) exemption nor compels it to discipline its employees in any particular way. The New York cases cited by the City, (Pet. 14), merely hold that termination of a civil service employee can be too excessive a penalty in specific circumstances. They impose no disciplinary structure requiring deductions from pay or suspensions of less than a week.

As the City acknowledges, (Pet. 23-24), when the DOL eliminated the part-day docking component of the salary basis test for public employers in 1991-92, it refused to eliminate the other components, finding that the public accountability concerns underlying the part-day docking changes were not present in the other aspects of the salary basis test. The DOL considered comments by public employers that urged that the salary basis test be eliminated altogether for public employees. The comments were similar to those made here by the City. The DOL found that there was insufficient basis to distinguish between the private and public sectors in this area and that the commenters failed to demonstrate that public employers are significantly more restricted than private employers in the availability of options with respect to employee discipline, since termination, reprimands, demotions and reassignment are all generally available. 57 Fed. Reg. at 37674. In addition, the DOL has ruled that deductions of one day or more from accrued leave would not violate the test. Letter Ruling of March 30, 1994 (RA-4).

DOL also rejected the suggestion that §541.118(a)(6) be amended to provide that the exemption is lost only in the week that the improper deduction occurred, finding that the

suggested change would be a significant departure from long-standing policy. 57 Fed. Reg. at 37675.

Many employers, including the City, have modified their policies to satisfy the test.[15] From September 15, 1993 to the present, the City has been able to claim the §13(a)(1) exemption without adverse consequences. While the City continues to question the rule's rationality, one thing is clear: "public accountability" and "progressive discipline" principles have not been eroded.

C. *The Salary Basis Test Does Not Contravene Congressional Intent*

The City contends that because the salary basis test was promulgated initially with the private sector in mind, years before the FLSA even applied to the public sector, the salary test should not apply to the public sector. The City claims the salary basis test thwarts congressional intent. (Pet. 20). However, Congress has not expressed an intention that the salary test not apply in the public sector. Neither the original Act, nor any subsequent amendment, nor the legislative history suggests that the test should be applied any differently to public employees.

The City relies on one ambiguous piece of legislative history in arguing that the salary test as applied to public employees conflicted with legislative intent, i.e., the language in the House Report on the 1974 amendments to the FLSA stating, "the bill extends minimum wage and overtime protection coverage to about 5 million *non-supervisory* employees in the public sector." (H.R. Rep. No. 913, 93rd Cong., 2d Sess.

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[15] For example, on October 9, 1990, March 29, 1991 and June 27, 1991, respectively, the Fort Worth Fire Department (*Simmons v. Fort Worth*, 805 F.Supp. 419, 422 (N.D., Texas 1992)), New York City Transit Authority (JA, 889, 939) and the State of Nevada (*Benzler v. State of Nevada*, 804 F.Supp. 1303 (D.Nev. 1992)) changed their rules, so as to prohibit part-day docking of FLSA-exempt employees.

(1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837) (emphasis added).

However, by extending FLSA coverage to "non-supervisory employees in the public sector, Congress was extending the §13 (a)(1) exemptions to public employers so that the provisions of the Act would be administered "in such manner as to insure consistency with the meaning, scope, and application established by the rulings, regulations interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. No. 913, *supra*. Thus, the Secretary's choice, following the 1974 Amendments, to apply the "salary basis" regulation at 29 C.F.R. 541.118, as it existed, to public employees was reasonable, not inconsistent with congressional intent and a "permissible construction." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 843.(1984).[16]

D. *The Secretary's Regulations Relating to the Section 13(a)(1) Exemption Should be Accorded Great Deference as they are a Permissible Construction of the Statute*

The City, in the alternative, asks this Court to grant the Writ to answer its question as to whether the salary basis test is a legislative regulation or an interpretation (Pet. 25). But there is no question that the salary basis test is a regulation. No court of appeals has held otherwise.

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[16] The House Report on the 1985 amendments states that Congress recognized that it was "essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and accommodated." H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 17 (1985). These amendments accommodated public employers in several respects. For example, Congress allowed public police and fire departments to place employees on shifts of longer than 40 hours per week without paying them at the statutory overtime rate and also allowed all public employers to substitute compensatory time for cash overtime compensation. *See* 29 U.S.C. § 207(k), (o). Changing the salary basis test was not one of the accommodations that Congress found to be necessary then at or any subsequent time.

Section 13(a)(1) of the FLSA provides an exemption from the Act's overtime provisions to "any employee employed in a bona fide executive, administrative, or professional capacity...(*as such terms are defined and delimited from time to time by regulations of the Secretary*, subject to the provisions of the Administrative Procedure Act ...)." 29 U.S.C. §213(a)(1) (emphasis added). Congress thus specifically and expressly authorized and empowered the Secretary of Labor to "define and delimit" the contours of the § 13 (a)(1) exemption.

In 1940, the salary basis test was initially promulgated. 5 Fed. Reg. 4077. In 1949, the DOL amended the regulation to specify precisely what it meant to be paid on a salary basis. 14 Fed. Reg. 7730, 7735 (1949) and in 1954, the DOL further elaborated the test. 19 Fed. Reg. 4405, 4406 (1954). *See also* 19 Fed. Reg. 1321 (1954).

In 1992, after conforming to the APA requirements, the Secretary revised the test to fully take into account the principle of public accountability. By modifying its regulations from time to time, the Secretary of Labor has recognized the need for agency flexibility and its role to resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities" *Chevron, supra*, 467 U.S. at 865-66.

As this Court has held "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the Statute by regulation." *Chevron, supra*, 467 U.S. at 843-44. "In a situation of this kind, Congress entrusts to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term." *Batterton v. Francis*, 432 U.S. 416, 425 (1977). The courts must give legislative regulations "controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Chevron* 467 U.S. at 843-44.

This Court has held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*. at 843. *Chevron* thus recognizes that administrative agencies are the proper bodies to address complex policy issues within their area of expertise when Congress has not spoken to those issues.

Unlike this case, *Skidmore v. Swift & Co*, 323 U.S. 134, 140 (1944), relied on by the City, did not involve an agency regulation adopted through the rulemaking process and pursuant to express congressional delegation. Rather, it involved a bulletin and some informal rulings drafted in the absence of congressional delegation of authority to define the terms in dispute.[17]

In view of the fact that Congress expressly delegated authority to the Secretary to define the § 13(a)(1) exemption, this Court, if it addresses the issue at all, should treat the Secretary's exercise of that authority with the highest deference. *Avery supra*, 24 F.3d at 1340; (according deference to the disciplinary component of the salary basis test); *Mueller supra*, 54 F.3d at 442 (holding that the salary basis test as amended by § 541.5d was promulgated pursuant to express congressional delegation, and therefore, need only be rationally related to the objectives of the FLSA).

As to the City's reliance on *Freeman v. National Broadcasting Company, Inc.*, 80 F.3d 78 (2d Cir. 1996), suffice it is to say that *Freeman* is not even a salary basis case.

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[17] The fact that the salary basis regulation was misplaced in the interpretation section of the Code of Federal Regulations does not turn it into an interpretation since it was adopted pursuant to regulatory authority and procedure.

E. *The Failure of Congress to Amend the Salary Basis Test is an Indication of Congressional Intent*

It is well settled that "[w]here 'an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982). "In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive that the interpretation is the one intended by Congress." *See, NLRB v. Bell Aerospace Company*, 416 U.S. 267, 274-275 (1974).

Furthermore, "it is appropriate to attribute significance to [congressional] inaction where an administrative interpretation 'involves issues of considerable public controversy,' ...and Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter." *Guardians Association of the New York City Police Department v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983).

In amending the Act in 1966, 1974 and 1985 to apply to the public sector, Congress did not alter the regulations applying the exemption provisions contained in § 13(a)(1).[18] Nor did Congress direct the Secretary of Labor to adopt new regulations making special provisions for the application of § 13(a)(1) to state and local government employees. Given the fact that Congress has amended the Act several times and has not changed the long-standing salary basis regulation and there has been considerable public controversy regarding the regulation, including issues raised by petitioners themselves,

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[18] 80 Stat. 83 (1966); 88 Stat. 55 (1974); 99 Stat. 787 (1985).

the only reasonable inference to draw is that the DOL's interpretation is the one intended by Congress.[19]

In short, the acceptance of the City's position regarding validity would require the Court to turn principles of statutory construction on its head in order to nullify a well-established regulation that Congress has never renounced. Further, such acceptance would undermine the deference due to the Secretary's express authorization to promulgate reasonable regulations to carry out the intent of Congress.

IV

THE TENTH AMENDMENT IS NOT IMPLICATED IN THIS CASE

Despite this Court's definitive holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) laying to rest the question of whether the Tenth Amendment limited the power of Congress to extend the Fair Labor Standards Act to state and local governments, and despite the fact that no court of appeals has found that the Tenth Amendment restricts the application of the FLSA or its salary basis test to state and local governments, the City urges this Court to revisit *Garcia*, or at least to interpret *Garcia* so as to allow a "political effectiveness" test to determine whether the DOL regulation should be applied. However, this Court is extremely reluctant to involve itself in areas where the political process operates within the constitutional framework. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Rodriguez v. United States*, 480 U.S. 522 (1987).

In *Chevron* and *Rodriguez* this Court held that it is Congress and the executive branch and not the courts that may chose between competing policies, compromising one to

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[19] In 1989, 1990, and 1993, Congress again amended the FLSA. 103 Stat. 938 (1989); 104 Stat. 2871 (1990); 107 Stat. 6 (1993). It once again made no modifications of §13(a)(1) or the Secretary's "salary basis" regulations.

advance another. "[D]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez*, 480 U.S. at 525. The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. "Our Constitution vests such responsibilities in the political branches." *Chevron*, 467 U.S. at 866.

In *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) this Court held that "Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation." The City claims that such extraordinary defects in the political process are present here. The District Court found otherwise, stating (A24-25):

> I perceive absolutely no basis in this matter for finding 'extraordinary defects in the national political process' under *Garcia-Baker* despite defendants' assertion that 'the political process has broken down'... To the extent that defendants complain about the political process, they focus upon the damages they face in this action - which they view as an undue burden and a result of failures in the political system - without pointing to any substantive defect in the political process itself.

But, as the lower court found, "the political process has operated proficiently despite the enduring existence of defendants' exposure to liability under the FLSA. Indeed the existence of §541.5d and the redemption it affords in this very action to defendants' part-day docking policies provides concrete proof of the vitality of the political process." (A 24-25)

The City's reliance on *Gregory v. Ashcroft* 501 U.S. 452 (1991) is also misplaced. (Pet. 22-33). As the Court of Appeals stated in *Reich v. State of New York* 3 F. 3d 58 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994) "[N]othing in

Gregory resurrects the substantive Tenth Amendment limitations interred by *Garcia*." In *Reich*, the Court found that the award of overtime pay to criminal investigators was "not so intrusive as to strike at 'the heart of representative government.'" 3 F. 3d at 589-90.

Through the political process the City, along with other state and local public employers, successfully obtained revisions of the DOL regulations to eliminate part-day docking. Section 541.5d was promulgated as an Interim Final Rule on September 6, 1991 and as a final rule on August 19, 1992. The discussion in 57 Fed. Reg. 37674, *et seq.* shows the active participation of the City in the rulemaking process.[20] In 1985, following the Supreme Court's decision in *Garcia*, state and local governments secured amendments to the FLSA which significantly limited their expenditures for overtime pay by allowing for compensatory time and providing for a higher number of hours in the workweek for police and fire employees before overtime pay was required. 57 Fed. Reg. 37667.

When the 1991-2 revisions to the salary basis test failed to eliminate the entire test, New York City actively supported legislation eliminating the salary basis test by writing to members of Congress, testifying (in the person of the Corporation Counsel) before the House sub-committee considering such legislation and taking other political action. (JA 271-87, 1109-10).

The City complains about the slowness of DOL's response to their perceived problems in the salary basis test's application to the public sector. The DOL's rulemaking in 1991-92 may not have been quick enough to satisfy the City and other public employers. The DOL's failure to make further accommodation to the perceived needs of the City by eliminating

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[20] Moreover, New York City, like other state and local employers had an opportunity to and did comment in 1985 on proposed rulemaking concerning the salary basis test. When asked whether the test should be eliminated, New York's Labor Relations Director said "no". (JA 255, 935)

the salary basis test altogether is a grave disappointment to the City. On the other hand, the DOL's action in 1991-92 was a blow to white-collar employees who work long hours[21] and expected that after *Garcia* and the 1985 FLSA amendments that they would be treated like their counterparts in the private sector. DOL's unwillingness to make further distinctions between the public and private sectors is in our view, faithful to those amendments.

The City also claims that the "denial of the managerial exemption" intrudes on states' rights. (Pet. 27) But there is no denial of the managerial exemption. Defendants have availed themselves of the managerial exemption since September, 1993, because they did what all employers should do - they obeyed the law. Nor is it true, as the City claims, that it is prevented from withholding pay or reducing salaries of their employees. It simply must do so in ways not violative of the salary basis test.

Finally, the City claims that decision-making has been shifted from Congress to regulatory agencies whose officials are not directly accountable to the electorate. But Congress has repeatedly amended the FLSA, four times since *Garcia*.[22] If Congress had considered the requests by public employers to eliminate the salary basis test as to public employees to be worthy of enactment, it obviously would have done so. The City now seeks to have this Court legislate where Congress has consistently refused to do so.

In the meantime, while this case was pending in the lower court, the defendants declined to limit their liability which they could have done easily by changing their rules. It was not until September and October, 1993 that the three defendant agencies revised their rules in accordance with the District

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[21] The FLSA was designed to protect employees from "the evil of 'overwork', as well as 'underpay'." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 739 (1981).

[22] See fns. 18 and 19, pp. 23-24 above.

Court's decision. (RA 1-2). These changes put the defendants in compliance with the salary basis test and no additional liability has been incurred since then. Significantly, the City does not discuss these changes in cataloguing all the drastic consequences that will result from the application of the remaining portions of the salary basis test. Nor does it cite any actual instances in which the inability of the defendants to deduct from managers' pay checks for absences of less than a full week due to disciplinary penalties, court attendance or military leave has interfered with their ability to appropriately discipline employees or otherwise conduct their governmental functions in accordance with their sovereign interests.

The political process is still alive and well. Indeed, the City has achieved to date a large measure of success in utilizing the various available political remedies. The fact that it has not achieved complete success by eliminating past liability or changing the remaining portions of the salary basis test does not signify a breakdown in the political process. It simply means that in politics you do not always win.

The terrible consequences envisaged by the City are not grounded in reality. As this Court said in *Garcia* (469 U.S. at 556), quoting from Justice Frankfurter in *New York v. United States*, "The process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world..." 326 U.S. 572, 583 (1946).

CONCLUSION

For the above reasons, the Petition should be denied. Nor is there any reason to delay denial of the Petition pending this Court's resolution of the *Auer* case. There is no genuine issue in this case that could be affected by *Auer*.

Respectfully submitted,

JOAN STERN KIOK
Counsel of Record
Attorney for Respondents
26 Broadway
New York, New York 10004
(212) 747-1414

ROBERT N. FELIX
Of Counsel

August 23, 1996

APPENDIX

APPENDIX

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK

MEMORANDUM

TO: Agency Heads

FROM: Herman L. Jenkins City Personnel Director

SUBJECT: "Leave Regulations for Management Employees" and Other Related Regulations and Policies Affecting Civilian and Uniformed Managers

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This is to inform you of certain changes in Personnel Order No. 88/5, the "Leave Regulations for Management Employees", and other applicable regulations and policies affecting civilian and uniformed managers that are being made so that the City will be in conformance with the requirements for exemption from the overtime provisions of the Fair Labor Standards Act cited by United States District Judge Loretta A. Preska in her July 12, 1993 decision in *Yourman et al. v. Dinkins et al.* (Fair Labor Standards Act Applicability to Managers who Work in Excess of 40 Hours per Week). These changes are effective immediately. Amendments to Personnel Order No. 88/5 and other regulations and policies will be issued shortly.

Please see that your Personnel, Payroll and Timekeeping divisions are made aware of the following changes:

- Except for an infraction of a safety rule of major significance which creates a serious danger to the work site or to other employees, the following disciplinary penalties are prohibited: docking of pay; docking of annual leave; suspension without pay and fines. In addition, managerial lump sum payments may not be docked for misconduct.

- A manager's pay may not be docked in connection with a 30-day suspension prior to resolution of disciplinary charges.

- A manager's pay may not be docked for temporary military leave, regardless of the length of the leave. However, if during a calendar year, a manager's military leave exceeds, in the aggregate, 30 calendar days or 22 working days, whichever is greater, then for the excess number of days, the manager must remit to the City an amount equal to the amount received in military pay for these excess days, provided, however, that in no case may the manager be required to remit to the City an amount greater than the amount of the manager's salary for these excess days.

- A manager's pay may not be docked for attendance as a witness at any deposition, examination before trial, grand jury proceeding, court hearing or trial, or hearing or investigation before an administrative agency or legislative body. However, to be eligible for this paid leave, the manager must remit to the City an amount equal to the amount received for such attendance as a witness, less any amount received as reimbursement for travel expenses, provided, however, that in no case may the manager be required to remit to the City an amount in excess of the amount of the manager's salary for the period of such leave with pay. In addition, the manager must submit satisfactory evidence of actual attendance as a witness. Examples of satisfactory evidence include a letter from the attorney or party who called the manager, stating that the manager was called as a witness in the matter and did actually appear on the specified date(s) and, if issued in the matter, one of the following: a subpoena; court or administrative order; notice of deposition; or notice of examination before trial.

- A manager's unexcused tardiness, both upon arrival at work and upon return from a meal break, shall be charged to the manager's accrued leave balances. Only if the manager's accrued annual leave balances are exhausted may his or her pay be docked for unexcused tardiness, and then pay may be docked only to offset the

actual amount of time missed through unexcused tardiness.

- A manager who has negative leave balances when he or she leaves City service may not have his or her pay or managerial lump sum payment docked to offset the negative leave balances.

If you have any questions regarding the above changes, please call Andrea Wrubel, Director of Special Programs, at (212) 487-5736.

cc: Personnel and Budget Officers

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

Letter Ruling of March 30, 1994

This is in response to your inquiry concerning the application of §541.118 of 29 CFR 541 to employees who may be suspended without pay for disciplinary purposes. We regret the delay in formally responding to your inquiry.

As you know, a copy of our December 24, 1991, letter to the National Association of State Personnel Executives concerning this issue was previously furnished to___of your office. We will not restate it here. However, we wish to emphasize that disciplinary deductions from the salaries of otherwise exempt employees are permissible *only* for the reasons cited in that letter. Thus, employees may not be suspended without pay for a day or more where the reason is something other than serious safety violations. Under the general rule in 29 CFR §541.118(a). however, an employee need not be paid for any workweek in which he or she performs no work (for whatever reason). We hope this will clear up the confusion on this issue. [Emphasis in original]

We continue to believe that employees maybe appropriately disciplined in other ways. For example, it would appear that reducing accrued leave entitlement by a day or days for the infraction could achieve the desire disciplinary goal. In our view such a practice would not affect the salary basis of payment describe in 29 CFR §541.118, or otherwise adversely affect the application of §13(a)(1).

We trust that the above is responsive to your inquiry.

[Opinion signed by Wage Hour Administrator Marie Echaveste, March 30, 1994.]

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

Letter Ruling of December 24, 1991

You will recall that at your____ meeting last summer, I promised to provide your organization with an explanation of the effect of disciplinary deductions under Regulations, 29 CFR Part 541. I regret the delay in providing this information but think that you will still find it useful.

As I explained in my remarks, the only deductions which may be made from an employee's compensation without affecting the "salary basis' of payment are found in §§ 541.118(a)(2), (3), and (5) of the Regulations (copy enclosed). The only discipline-related deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." As explained in §541.118(a)(5), safety rules of major significance embrace those intended to prevent serious danger to the facility or other employees, including prohibitions against smoking in explosive plants, oil refineries and coal mines. The Department of Labor has also construed this language to cover penalties imposed for violations of industrial security regulations promulgated by the Department of Defense.

The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in §541.118(6). Where a one-time disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks *if* the employer reimburses the employee for such deduction *and* agrees to not take any such impermissible deductions in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular basis (e.g. because of an employer's policy) we would question whether such employees, including all of those in the "class" or "category" of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in *all* workweeks. [Emphasis in original]

I would again emphasize that these rules are not intended, and should certainly not be construed, to prevent employers from taking appropriate disciplinary action with respect to their employees. Rather these rules effect a long-standing interpretation of employment practices that typically distinguish those employees who are paid "on a salary basis" from those who are not. That is to say those employees who are paid "on a salary basis" are not generally subject to disciplinary action that results in deductions from their salary, but are and can be appropriately disciplined in other ways.

I trust that the above discussion fulfills my commitment. Please let me know if you have any further questions in this matter.

[Opinion signed by the Acting Wage Hour Administrator John R. Fraser, December 24, 1991.]

(3)

No. 96-152

Supreme Court, U.S.
FILED
AUG 19 1996

IN THE

Supreme Court of the United States

October Term, 1995

RUDOLPH W. GIULIANI, as Mayor of the City of New York, *et al.*,

Petitioners,

against

HAROLD YOURMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CITY TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

RICHARD SCHOOLMAN
(Attorney of Record)
OFFICE OF MARTIN B. SCHNABEL
Acting Vice President & General Counsel
New York City Transit Authority
130 Livingston Street (12th Floor)
Brooklyn, NY 11201
(718) 694-4667
Attorney for Amicus Curiae

THE REPORTER CO., INC.-Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
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Statement of Interest

The New York City Transit Authority ("Transit Authority") submits this brief amicus curiae in support of petitioners (now "Rudolph W. Giuliani as Mayor of the City of New York, et al." and referred to collectively in this brief as "the City of New York"). This brief, to whose filing the parties have consented,[1] urges this Court to grant the City of New York's Petition for a Writ of Certiorari in this case, Yourman v. Dinkins, 84 F.3d 655 (2d Cir. 1996), petition for cert. filed sub nom. Giuliani v. Yourman, No. 96-152 (1996), in which the Court of Appeals for the Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993), "on the opinion[] of the District Court" (84 F.3d at 656). (This litigation, for the sake of simplicity, will be referred to as Yourman.)

The New York City Transit Authority is a New York State public authority and public benefit corporation created under the New York Public Authorities Law, § 1201 et seq. All of the Transit Authority's board members are appointed by the Governor of the State of New York (Public Authorities Law §§ 1201(1), 1263(1)(a)), and it is not an agency, despite its name, of the City of New York. It runs, within New York City, the country's largest public mass transit system -- subways and bus lines that operate 24 hours a day, every day of the year -- and has over 40,000 employees, some 2,000 of whom are deemed "managerial" by the Transit Authority. As managers, while they may normally be scheduled to work five days per week (including weekends in many instances), seven or eight hours per day, they are expected to work longer if operational problems require

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[1] Copies of the parties' letters consenting to the filing of this brief have been filed with the Clerk.

(and they frequently do so). They are paid an annual salary and are not paid overtime, being treated by the Transit Authority as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, because they are, in the Transit Authority's view, within the FLSA's exemption from the Act's overtime pay requirements that is available for "bona fide executive, administrative, or professional" employees (29 U.S.C. § 213(a)(1)). If the Transit Authority could not treat its managers as exempt, it would have to deploy its managers less flexibly to try to limit the amount of overtime it would have to pay to already well-paid personnel, thereby tending to harm service; the Transit Authority would certainly have to pay out more money to its managers (who are already well paid in part because they were not to receive overtime pay), thereby exacerbating its already difficult financial situation; and, perhaps most importantly, the Transit Authority would risk having its managers' becoming less willing to manage their subordinates in a cost-effective manner as the managers' incentive to try to minimize overtime among their subordinates would be compromised by their own eligibility for the kind of overtime they should be controlling .

Shortly after the District Court's decision in Yourman v. Dinkins reported at 826 F. Supp. 736 -- just affirmed by the Second Circuit "on the opinion[] of the District Court" (84 F.3d at 656) -- a number of Transit Authority managers commenced an action for FLSA overtime, relying substantially on the District Court's Yourman v. Dinkins decision. The action against the Transit Authority, Lilenfeld v. Kiepper, No. 93 Civ. 5691, in which there are now 320 plaintiff-employees (none of whom disputes that his or her duties are in fact "managerial"), is pending in the Southern District of New York; no liability

determination has yet been made.[2] And while the employment policies of the Transit Authority at issue in Lilenfeld differ from those of the City of New York in Yourman, some of the legal issues are similar. Because of the enormous importance to the Transit Authority, and to state and local public employers generally, of those legal issues -- going to, for instance, not just the cost of employing and deploying managers but to the ability of such public employers to manage their managers and to have those managers cost-effectively manage their subordinates -- an additional perspective on some of those issues might assist this Court. In this brief, the Transit Authority will try to provide such a perspective in support of the Petition.

ARGUMENT

Introduction

The Petition in this case seeks this Court's review of a Second Circuit decision applying to a local government employer, and interpreting in a controversial way, what that Court of Appeals termed the United States Department of Labor's ("DOL") "salary basis test" (often called the "salary test"), codified at 29 C.F.R. § 541.118(a). The salary basis test, which came into its essentially current form in 1954, was prepared by DOL to help private sector employers determine whether their employees were, under the FLSA's section 13(a)(1) (i.e., 29 U.S.C. § 213(a)(1)), "bona fide executive, administrative, or professional" personnel, and thus statutorily exempt from the FLSA's requirements for overtime pay for work beyond 40 hours in a workweek.

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[2] Cross-motions for summary judgment are sub judice.

The Yourman Courts -- the District Court and the Second Circuit because it adopted the opinion of the lower court -- applied the salary test to local government employers, and accorded controlling deference to that test (as the Yourman Courts understood it), without, however, explaining why they should do so. The Petition thus raises questions about how local governments should manage themselves and whether Congress's intent in expanding the coverage of the FLSA to "non-supervisory" government personnel is fairly expressed by a DOL salary test that, as applied by the Second Circuit in Yourman, covers entire groups of public employees whose duties are concededly managerial. The Petition should be granted because these questions are important to every state and local government and have been dealt with in widely varying ways among the federal courts. Moreover, the Second Circuit's Yourman decision is now in direct opposition to the views of the Department of Labor itself on some of these questions.

I. THE PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DECIDE WHETHER THE SALARY BASIS TEST IS UNENFORCEABLE AGAINST STATE AND LOCAL GOVERNMENT EMPLOYERS.

As outlined in the City of New York's Petition, there are many reasons to question whether the Department of Labor's salary test is validly enforceable against state and local government employers. That issue has divided the Courts of Appeals (and District Courts), and appears to be one of the issues before this Court in Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), petition for cert. granted, No. 95-897 (1996). That issue calls for the City of New York's Petition to be granted because the issue involves how Congressional intent -- against which the salary test must be measured -- may be determined in an area of

concern to almost every state and local government. So as not to repeat material set out in the Petition, the Transit Authority here will note one matter of public policy and suggest how applying the salary test to state and local governments is inconsistent with that policy and inconsistent with Congress's expressions of its own intent.

Courts have repeatedly ascribed to Congress the intention, when Congress extended the coverage of the FLSA to government employees, of not interfering with those employers' needs to continue to operate on the principle of "public accountability." See, for instance, the discussion in Service Employees Int'l Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1352 (9th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996). And while "public accountability" typically involves the notion of avoiding having government agencies' paying public employees for time not worked (id.), and provisions of the salary test (or the entire test) have been invalidated as to public sector employers where those provisions call for pay for time not worked, there is an even more fundamental aspect of "public accountability" inherent in determining who is a true state or local government manager (and thus exempt from the FLSA's overtime provisions).

"Public accountability" depends on a government's having effective managers to manage the government's affairs, including directing the non-exempt workforce cost-effectively (and minimizing that workforce's overtime in the process). If governmental personnel of undisputed managerial responsibility -- as are all of the plaintiff-employees in the Yourman case, and in the pending Transit Authority litigation -- find themselves, by virtue of the application of the salary test, to be eligible for FLSA overtime because the government's pay or personnel policies are inconsistent in some way with a provision of that

test, those managers (and the public agencies they run) will be put into a difficult situation, a situation potentially destructive of local government's ability to ensure "public accountability" in its operations. Those managers will have a financial stake not in minimizing overtime but in maximizing it, for those they supervise and for themselves. And since such potentially no-longer-exempt managers are already a relatively small percentage of the total number of public sector employees (about 4% in the case of the Transit Authority), and such potentially no-longer-exempt managers ascend up to the highest levels of state and local government (stopping only at managers who are directly appointed by or supervised by, or who serve as "immediate advisor[s] to," elected officials (see, e.g., 29 C.F.R. § 553.11(b)), almost all managers will be placed in a position of being eligible for overtime pay when their responsibilities should call on them to minimize such expenses. (Indeed, among the 320 plaintiffs in the Transit Authority litigation is a former Vice President, the equivalent of an Assistant Commissioner of a city or state agency or department.) In other words, ignoring "public accountability" by applying the salary test to state and local government personnel who are clearly managerial in terms of their duties will raise, inevitably, what Justice Story of this Court elegantly described as that "anxious inquiry": "quis custodiet custodes?" (Briscoe v. Bank of Kentucky, 36 U.S. 257, 348 (1837)).

The answer to that question -- i.e., who will guard the guardians (of the public's money)? -- is to avoid having to answer it by adopting a common sense approach to what almost certainly was Congress's intent in extending the FLSA to government employees. As the City of New York has indicated (Petition, at 19-20), Congress had in mind extending the FLSA only to government employees it repeatedly described as "non-supervisory." And the FLSA was intended "to aid the ...

lowest paid of the nation's working population ... [unable] to secure for themselves a minimum subsistance wage" (Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1944)), not to give well paid personnel with managerial powers and "prestige ... a [further] benefit from their employers for which they did not bargain" (Freeman v. National Broadcasting Co., 80 F.3d 78, 86 (2d Cir. 1996)), or to create difficulties in managers' properly managing their subordinates and exercising their discretion (29 C.F.R. §§ 541.1(f), 541.2(e)) on behalf of the public employer whose affairs they direct. Accordingly, where the duties of governmental personnel are found to be (or, as in Yourman, are conceded to be) managerial, Congress's intent, and the ultimate protection of the principle of "public accountability," call for the salary test to be reviewed by this Court to determine whether the test should be held inapplicable in the public sector as inconsistent with Congress's intent.[3]

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[3] The Department of Labor is not the only agency charged with helping governmental employers decide which employees should be deemed exempt from the FLSA overtime pay requirements, i.e., which employees Congress intended to be included in the statutory classes of "bona fide executive, administrative, or professional" personnel. The FLSA has also become applicable to millions of federal (civilian) employees and the agency charged by Congress with administering the FLSA for most such federal employees, the Office of Personnel Management, has nothing comparable to the DOL's salary test. Instead, it relies on job levels and responsibilities to determine exempt status (5 C.F.R. §§ 551.201-208), a fact noted by the DOL at 57 Fed.Reg. 37667 (Aug. 19, 1992). This divergent approach to interpreting the same statutory exemption language (i.e., the FLSA's section 13(a), 29 U.S.C. § 213(a)(1)) creates, in itself, a doubt about whether the salary test should be given any special deference for state and local governments.

II. THE PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DECIDE WHETHER THE DISCIPLINARY PROVISIONS OF THE SALARY BASIS TEST ARE UNENFORCEABLE FOR BEING SO BIZARRE AS TO BE NOT RATIONALLY RELATED TO, LET ALONE A PERSUASIVE GUIDE TO, DETERMINING EMPLOYEES' "BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL" STATUS.

The Second Circuit in Yourman, as did the District Court whose decision it affirmed, passed over in silence the bizarre nature of the disciplinary provisions of the salary test. In so doing, the Second Circuit ignored not only the Seventh Circuit's view that the "rationality" of determining true managerial (and thus FLSA-exempt) status based on strict enforcement of those provisions seemed "pretty feeble" (Mueller v. Reich, 54 F.3d at 444), but failed to address the question of whether those provisions are in and of themselves so bizarre as to be unenforceable. Review by this Court would bring sense to this matter, which is critical to every state or local government's ability to control itself by managing its managers flexibly and appropriately.

The salary test's disciplinary provisions, briefly described, allow an employer to suspend managers without pay "for infractions of safety rules of major significance" without affecting the managers' exempt status (29 C.F.R. § 541.(a)(5)). Suspensions without pay for any other reasons jeopardize that status unless they last for an entire workweek or otherwise occur during a workweek in which the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence).

To begin with, not only is there a naturally wide variety of judicial views on what would constitute a "safety rule of major significance,"[4] there is no apparent reason to distinguish, in seriousness or operational importance, between major safety infractions (for which a manager may be suspended without pay without risk to exempt status) and "major" non-safety infractions, whatever they may include (for which infractions a manager might lose his exemption if suspended without pay). Indeed, during World War II and for several years thereafter the version of the DOL salary test then in effect allowed for (private sector) managers to be suspended for non-safety infractions (absenteeism) without losing their exempt status (because that was common practice in the private sector at that time);[5] and -- judging from the numerous FLSA lawsuits involving this matter -- it appears that in the public sector, in the decade since the FLSA became applicable to public-sector employees, at least the possibility of suspensions of managers for non-safety infractions is widespread (if very rarely utilized).

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[4] For instance, in Meringolo v. City of New York, 908 F. Supp. 160, 169 (S.D.N.Y. 1995), the Court was apparently willing to deem any rule violation by a New York City Department of Corrections Captain sufficiently safety-related to be an infraction of a "safety rule of major significance." The Court in Auer v. Robbins, 65 F.3d 702, 710 (8th Cir. 1995), cert. granted, 116 S.Ct. 2545 (1996), disagreed.

[5] See, U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 24-26 (June 1949), discussed by the Court in Mueller v. Thompson, 858 F. Supp. 885, 894 (W. D. Wis. 1994), rev'd on other grounds sub nom. Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), petition for cert. filed, 64 USLW 3297 (Oct. 10, 1995).

Surely, for instance, a public sector manager's negligence (or theft) causing the loss of millions of public dollars or the shutting down of public-sector services, or the local government's bankruptcy, could be catastrophic to the public employer, even if "safety" is not involved directly. The oddness of the disciplinary provisions, moreover, can only be exacerbated by the fact that while the DOL's salary test limits the ability of employers to suspend their managers without pay for even the most egregious non-safety misconduct, employers are perfectly free not to pay those same managers for taking a day off for "personal" reasons (such as, presumably, attending a baseball game, a child's graduation ceremony, or a house closing (29 C.F.R. § 541.118(a)(2)).

In addition, the disciplinary portions of the salary test are bizarre in that suspensions of managers without pay for non-safety infractions (or for minor -- or less than "major" -- safety-rule infractions) are quite acceptable to the DOL, and will not endanger exempt status, if the suspensions are for one full workweek (typically five days, say, Monday through Friday); but such suspensions are somehow not acceptable if the five payless days cross from one workweek to another (say, Thursday, Friday, Monday, Tuesday, and Wednesday [or Thursday, Friday, Saturday, Sunday, and Monday][6]), or (normally) if the payless suspension is not for five days in a workweek but for one, two, three, or four days in that workweek. That makes no sense.

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[6] The Transit Authority, which operates its subway and bus lines every day of the year (and 24 hours a day), has numerous managers with normal schedules that call for work on weekends and thus call for "regular days off" on, for instance, Tuesdays and Wednesdays.

Finally, non-safety suspensions (or non-"major" safety infraction suspensions) without pay of less than a workweek are still acceptable to DOL to preserve exempt status if, during the remainder of the workweek, the otherwise exempt employee happens not to come to work, for any reason, so that during that workweek it turns out the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence). Thus, for instance, a manager's four-day non-safety suspension without pay (within one workweek) will not jeopardize exempt status if the manager, by chance or otherwise, does not work on the fifth day (because, perhaps, it is a holiday, or because on the fifth day the manager is sick, on vacation, on jury duty, at a baseball game, or for any other reason "performs no work").

It should not be surprising, therefore, that the courts that do address the matter more and more are deciding that the disciplinary provisions of the salary test are so ludicrous, so lacking a rational explanation, that they should be deemed unenforceable, and disregarded as a regulatory interpretation of the overtime pay exemption provided to "bona fide executive, administrative, or professional" personnel by the FLSA itself at 29 U.S.C. § 213(a)(1). For instance, taking up the Seventh Circuit's apparent invitation in Mueller, 54 F.2d at 443, that the rationality of those provisions should be litigated and decided, the District Court in Bowman v. City of Indianapolis, 927 F. Supp. 309 (S.D. Ind. 1996), determined that the rationality of the provisions is indeed so "'feeble'" as to make those provisions unenforceable:

> "In particular, we do not think it is rational to say that because an employee who is otherwise considered an exempt administrative, professional or executive employee might be docked one or two or three days pay, that it necessarily follows that the employee must

> therefore really be an hourly employee. . . . [I]s a bank vice president, who clearly meets the duties test for an executive employee, and who is paid $100,000 per year, to be considered an hourly employee just because she might be docked a few days pay for swearing at the bank president? The regulation appears to say so but we see no logic in this. . . . [A] $35,000/year executive does not cease to be a $35,000/year executive just because she is suspended for four days for breaking a rule. We do not doubt that it might be rational to look to the length or frequency of disciplinary suspensions without pay as one of several factors in determining the employee's status. However, we do not think it is rational to consider such suspensions as conclusive evidence that an employee is hourly. We therefore find that the disciplinary component of the salary test is arbitrary and capricious, and that, in accordance with the Administrative Procedure Act, we must set aside that regulation."

927 F. Supp. at 315 (emphasis in original). Similar in seeing the disciplinary portion of the salary test as producing "a ludicrous result" is Quirk v. Baltimore County, Md., 895 F. Supp. 773, 783 (D. Md. 1995).

This is not just an abstract argument. The real world consequences of failing to comply with the twists and turns of the disciplinary portion of the salary test regulations could be severe, indeed punishing: in the view of the Second Circuit (and District Court) in Yourman, loss of exempt status of an entire cadre of hundreds of well-paid managers. As a practical matter, the only way for state and local public employers to be sure not to run afoul of the salary test's disciplinary provisions -- which are in part imprecise and in part inexplicably bizarre -- is to pay every suspended manager (at least for a full workweek) although he or she might have to be suspended immediately, even in the

middle of a workweek. For instance, an immediate suspension might be required where the manager appears to have engaged in sexual or racial harassment of other employees, because the employer has a federal statutory obligation to eliminate such harassment from its workplaces (see Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840, 845 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991)); or where the manager's misconduct makes it essential that the manager immediately lose access to employer records or computers. Paying such a suspended manager would directly violate that aspect of the "public accountability" principle that guides most public payroll systems -- that public employees should not be paid for time they do not work -- and which principle, more and more courts are concluding, Congress did not intend the FLSA (and thus a DOL salary test) to interfere with. See Service Employees Int'l Union, 60 F.3d at 1352.

A final determination of the enforceability of the disciplinary provisions of the salary test, if it results in the invalidity of those provisions, could render the entire salary test invalid. That test -- or set of "interpretations" or "guides," to use the DOL's own words[7] -- was essentially written in 1954 as an interrelated

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[7] The provisions of the salary test themselves twice specifically describe themselves as only "interpretations" (29 C.F.R. § 541.118(a)(6)), and do so in the context of explaining that whether or not a deviation from the "interpretations" should cause a loss of exempt status "will depend upon the facts in the particular case" (id.). The DOL also has characterized its salary test generally as a set of mere "guides" intended to "assist" in determining whether (private sector) employees, "in borderline cases" where the employees' "prestige, status, and importance" are otherwise uncertain, should be deemed "executive, administrative, and professional" employees exempted by Congress from the FLSA's overtime requirements. U.S. Dep't of Labor, Report and Recommendation on Proposed Revision of Regulations, Part 541, at 2-3 (March 1958).

whole. For a court to find a part of the set inapplicable but to enforce the remainder would effectively be an exercise of judicial guideline rewriting or "rulemaking," which is, as the Ninth Circuit observed in deeming the entire salary test inapplicable to the public sector based on the invalidity of one portion of it, "a power with which we are not invested." Service Employees Int'l Union, 60 F.3d at 1354. The contrary view of some courts, such as in McCloskey v. Triborough Bridge and Tunnel Authority, 903 F. Supp. 558, 567 (S.D.N.Y. 1995), which found several parts of the salary test inapplicable to public employers but still applied the remainder of the test to a group of managers, should be rejected.

The historical record shows that Congress did not intend through the FLSA to regulate state and local governments' managing of their managers. The City of New York's Petition should be granted so that this Court may, in light of Congress's intentions, bring logic and reason to all state and local government employers that wish to manage, and occasionally discipline, their managers as they see fit.

III. THE PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY CONFIRM THAT RARE DEDUCTIONS IMPERMISSIBLE UNDER THE SALARY BASIS TEST SHOULD NOT RESULT IN THE ACROSS-THE-BOARD LOSS OF EXEMPT STATUS OF OTHERWISE EXEMPT MANAGERS OF STATE AND LOCAL PUBLIC EMPLOYERS.

The Second Circuit in Yourman, by adopting the District Court's liability decision, in effect concluded that, even though actual deductions from the plaintiffs' salaries that were impermissible under the District Court's understanding of the DOL salary test might be very rare or non-existent, nevertheless all of

the hundreds of plaintiffs -- even though almost none had any such deductions made -- should be deemed to have lost their exempt status (for the entire multi-year liability period) because they all were at least theoretically "subject to" (29 C.F.R. § 541.118(a)) impermissible salary reductions within what was presumed to be the Department of Labor's intended meaning of that language in the salary test. That conclusion calls for this Court to grant review in Yourman because, besides being more evidence of a split of authority among the Circuits (as discussed in the City of New York's Petition, at 34), that "theoretically 'subject to'" view of the salary test has recently been flatly rejected by the Department of Labor itself. And it is the DOL's understanding of what DOL had intended by its salary test that the Circuit Courts have been disagreeing about in this regard.

In the United States' May 31, 1996 amicus brief to this Court in Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), cert. granted, 116 S. Ct. 2545 (June 24, 1996), the Department of Labor's intended meaning of its own salary test's "subject to" language was made exquisitely clear. Rejecting reliance on theoretical possibilities (or rare examples) of pay deductions inconsistent with the salary test, and looking to the practical realities of actual conduct vis-a-vis a state or local government's managers as a group, the Department stated:

> "where no deductions have actually been made, or where there have been only isolated instances in which [impermissible] disciplinary suspensions have occurred, or where [impermissible] suspensions have occurred only under unusual circumstances, employees who are not themselves [impermissibly] suspended do not lose their salaried status."

Brief for the United States as Amicus Curiae at 7 [informal pagination], Auer v. Robbins, No. 95-897 (Supreme Court, May 31, 1996) (LEXIS, Genfed Library, Briefs File). This DOL view of its own salary test is obviously consistent with Congress's statement (albeit one made in a different context) that the FLSA should not be interpreted to allow employees to "receive windfall payments" (29 U.S.C. § 251(a)(4)).

Additionally, as to the one employee (or few employees) who actually suffered the unusual suspensions, the clarified view of the Department of Labor is that the so-called "window of correction" doctrine (see 29 C.F.R. § 541.118(a)(6)) lets the employer maintain the exempt status of even the impermissibly suspended employee(s) if the employer thereafter -- and perhaps long thereafter -- modifies its policies or practices to preclude such impermissible suspensions in the future and states that it intends to reimburse the suspended employee(s). Brief for the United States as Amicus Curiae at 10-11 [informal pagination], Auer v. Robbins. In this aspect too the view adopted by the Second Circuit in Yourman about the Department of Labor's intentions in the salary test -- which view limits the window of correction to only "inadvertent or unintentional" deductions (see 826 F. Supp. at 743) and which view conflicts with, for instance, the Eighth Circuit's view in Auer v. Robbins -- is now obviously and directly contrary to the DOL's view of its own salary test.

The recent clarification of the understanding of the Department of Labor's intended meaning of the salary test by the Department itself ought to be controlling as to what the salary test means and, as indicated above, is contrary to the understanding of the salary test found in Yourman (and in decisions of several other Circuits). The Department of Labor's intended meaning of its salary test, however, while definitively expressed

in the United States' May 31, 1996 Auer v. Robbins amicus brief, deserves effective implementation that this Court may provide through granting the City of New York's Petition in Yourman.

Conclusion

For the reasons outlined above, the City of New York's Petition for a Writ of Certiorari should be granted.

August 19, 1996

Respectfully submitted,

Richard Schoolman*
Office of Martin B. Schnabel
Acting Vice President &
General Counsel
New York City Transit Authority
130 Livingston Street (12th Floor)
Brooklyn, New York 11201
(718) 694-4667
Attorney for Amicus Curiae
New York City Transit Authority

*Attorney of Record

No. 96-152

IN THE

Supreme Court of the United States

October Term, 1996

RUDOLPH W. GIULIANI, as Mayor of the City of New York, *et al.*,

Petitioners,

against

HAROLD YOURMAN, *et al., etc.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE STATES OF NEW YORK, *et al.* IN SUPPORT OF PETITIONERS

DENNIS C. VACCO
Attorney General of the State of New York
The Capitol
Albany, NY 12224
(518) 473-0903

Dated: August 28, 1996

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record
PETER H. SCHIFF
Deputy Solicitor General
DANIEL SMIRLOCK
Assistant Attorney General

Of Counsel

(Additional Counsel listed on Inside Cover)

Printed on Recycled Paper

GAIL A. NORTON
Attorney General
State of Colorado
1525 Sherman Street
Denver, CO 80203

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
The Capitol
Tallahassee, FL 32399-1050

ALAN G. LANCE
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

THOMAS J. MILLER
Attorney General
State of Iowa
Hoover State Office Building
Second Floor
Des Moines, IA 50319

CARLA J. STOVALL
Attorney General
State of Kansas
301 S.W. 10th Avenue
Topeka, KS 66612-1597

JOSEPH P. MAZUREK
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
Capitol Complex
Carson City, NV 89710

JAMES E. DOYLE
Attorney General
State of Wisconsin
123 West Washington Avenue
Madison, WS 53707-7857

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No. 96-152

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RUDOLPH W. GIULIANI, as Mayor of the City of New York, *et al.*,

Petitioners,

-against-

HAROLD YOURMAN, *et al., etc.,*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE FOR THE STATES OF NEW YORK, *et al.* IN SUPPORT OF PETITIONERS

The amici curiae states, through their attorneys general, respectfully submit this brief in support of the petition for certiorari.

Statement of Interest

Public employment in the amici curiae states, as in most other public entities in the United States, is governed by the principle of public accountability. Because public employers are accountable to taxpayers for the use of public funds, public employees should not and cannot be paid for time in which they do no work. This accountability clashes directly with regulations of the United States Department of Labor (DOL) designed to implement the Fair Labor Standards Act by determining when employees are entitled to overtime compensation and when, because they are "employed in a bona fide executive, administrative, or professional capacity," they are not, 29 USC § 213(a)(1) (Supp. 1996). DOL's definition of this so-called "managerial" exemption includes a "salary basis" component: a government employee is not "paid 'on a salary basis,' " and thus is entitled to overtime, unless his pay "is not subject to reduction because of variations in the quality or quantity of the work performed" and unless he "receive[s] his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 CFR § 541.118(a) (1995). Government employees, moreover, lose their salaried status and became hourly employees entitled to overtime if a public employer makes deductions for absences caused by "attendance as a witness" or "temporary military leave," *id.* at § 541.118(a)(4), or if the employer makes deductions from an employee's pay for disciplinary violations other than "infractions of safety rules of major significance," *id.* at § 541.118(a)(5).

There is thus a direct conflict between the public accountability principle, which requires that public employees, salaried or otherwise, be paid only for the time they actually work, and the DOL salary basis test, which entitles public employees to overtime pay whenever their pay is reduced because they are not

at work or because they have been disciplined for failing to do their work properly. In the present case, as in most other cases in the circuit courts, the principle of public accountability has gotten much the worst of this clash. New York City, like the amici states, has policies limiting the amount of paid military leave employees may take, requiring that employees use leave balances or lose salary for court appearances as a witness when they or a relative has a personal interest in the proceeding, and subjecting employees to fines or suspensions for a variety of infractions that are not violations of safety rules of major significance. According to the United States District Court for the Southern District of New York, whose decision the Second Circuit adopted without analysis, the existence of these policies and the theoretical possibility of deductions from salary mean that hundreds of employees whose job duties are concededly managerial nonetheless do not meet the salary basis test and thus are entitled to overtime pay. As a result of following the principle of public accountability, New York City faces liability exceeding 14 million dollars.

Obviously, if the Second Circuit's decision is permitted to stand, what has happened to New York City can easily befall other municipalities or states. The public accountability principle requires that, under certain circumstances, deductions be made from the salaries of managerial employees; the salary basis test forbids this. One of these approaches must yield. If it is to be the public accountability principle that falls, exposing states to millions of dollars in liability and undermining their ability to vindicate both the public interest in responsible government expenditure and their own interest in fairly disciplining their employees, that decree should come from this Court, which has never heretofore decided or even addressed the issue. Indeed, part of the reason for the extraordinary abdication by the court below appears to be the Second Circuit's willingness to "leave

the ultimate resolution of the statutory dispute to the Supreme Court" (A6).[1]

Nor do recent developments in this Court make a grant of the petition for certiorari in the present case any less pressing. Thus, the interest of the amici states is not diminished by this Court's decision in *Seminole Indian Tribe of Florida v Florida*, 116 S Ct 1114 (1996). That decision effectively precluded, on Eleventh Amendment grounds, suits under the FLSA by private individuals against states in federal court. Nonetheless, the Department of Labor is itself empowered to sue employers under the FLSA, *see*, 29 USC § 216(c) (Supp. 1996), and may attempt to enforce the salary basis test against the states.

Likewise, it is true that this case raises the issues of whether the salary basis test is violated when government employees are merely "subject to" salary deductions that have not actually occurred, and whether a government employer loses the overtime exemption for an entire class of employees as a result of violating the salary basis test with respect to a single member or isolated members of that class. These issues are presented in *Auer v Robbins*, 65 F3d 702 (8th Cir 1995), *cert. granted*, 116 S Ct 2545 (1996). At the very least, their presence in the case at bar indicates that this Court should retain the case until *Auer* is decided. *See infra*, Point V. But other issues found here and not in *Auer* are also of great importance. The central question in the present case is whether the entire salary basis test, as applied to state and local governments, is arbitrary and capricious and therefore void under the Administrative Procedure Act, *see* 5 USC § 706 (1996). *Auer* does not directly raise this issue. Nor does *Auer* raise the issues of the rationality of DOL's

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[1]Numbers in parentheses preceded by "A" are to pages of the Appendix to the petition for certiorari.

interpretations of its salary basis test as prohibiting deductions from a managerial employee's salary for disciplinary violations, for military leave in excess of a given period, or for appearance as a witness in a proceeding in which the employee or a relative has a personal interest. Under the decision below, a state employer's enforcement of these policies may subject the state, as it did New York City, to millions of dollars in liability for overtime pay, while a state employer who eschews such policies perforce abandons the principle of public accountability. The amici States thus ask that this Court grant certiorari in order authoritatively to resolve all issues connected with application of the salary basis test to government employers.

REASONS FOR GRANTING THE WRIT

I. The decision below, by upholding the salary basis test as applied to government employees, cripples the public accountability principle and effectively deprives the states of the statutory exemption from payment of overtime to their managerial employees.

The Second Circuit attempted to resolve the conflict between the salary basis test and the public accountability principle by upholding the DOL regulation at the expense of a principle that DOL itself acknowledges is "designed to serve the public trust" and reflects the "higher standard of accountability" to which "public employers necessarily must be held." 57 Fed Reg 37669, 37673 (1992). Other federal courts have reached the

same conclusion, sustaining the applicability of the current salary basis test[2] to public employers despite the need of those employers to answer to their constituents for their employees' salaries. *See, Balgowan v State of New Jersey, Dept. of Transportation*, 84 F3d 656, 660-61 (3d Cir), *vacated*, 1996 WL 381898 (3d Cir July 9, 1996); *Mueller v Reich*, 54 F3d 438, 442 (7th Cir), *petition for cert filed*, 64 USLW 3297 (October 24, 1995) (No. 95-586); *cf. Service Employees International Union v County of San Diego*, 60 F3d 1346, 1353 (9th Cir 1995) (striking down entire pre-1992 salary basis test as applied to public sector, but intimating that amended test would survive scrutiny), *cert. denied*, 116 S Ct 774 (1996). These decisions put the states in the untenable position of choosing between loss of the overtime exemption for their managerial employees and abandonment of full accountability to the public for the expenditure of its funds. Because the salary basis test is both irrational as a violation of the public accountability principle and contrary to Congress's desire to preserve the overtime exemption for public employers, its use for public sector employment implicates the Administrative Procedure Act (APA).[3] After more than

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[2]As discussed *infra* and in the petition for certiorari, DOL changed the salary basis test in 1991 to permit public employers to retain the exemption for managerial employees whose salaries are reduced due to "absences for personal reasons or because of illness or injury of less than one day," 29 CFR § 541.5d (1995). Although the amici states agree with petitioners (pp 20-21) that the pre-1991 test is also before the Court, we focus on the test as amended.

[3]Under the APA, courts must set aside agency rules that conflict with Congressional intent or are arbitrary and capricious. *See*, 5 USC § 706 (1996). The amici States agree with petitioner (p 25) that the salary basis test, as an "interpretation" by an agency, must be persuasive rather than

(continued...)

a decade of inconsistent lower court decisions and mushrooming liability, this Court's scrutiny of the salary basis test as applied to public employers is both due and overdue.

To recognize the full force of petitioners' arguments and the urgency of the case, it is necessary above all to understand that the salary basis test is not an end in itself. The FLSA says nothing about "salary basis" or "salaried" employees. Rather, it provides for overtime payments "for a workweek longer than forty hours," exempts from this requirement "any employee employed in a bona fide executive, administrative, or professional capacity," and leaves it to the Secretary of Labor to define such employees. 29 USC §§ 207(a)(1), 213(a)(1) (Supp. 1996). By DOL's own account, it promulgated the salary basis test after hearings confined to testimony from private sector witnesses,[4] which "show[ed] that *bona fide* executive, administrative and professional employees in the industries at that time subject to the FLSA were almost universally paid on a salary basis," and "indicated that employees who did not meet the salary test generally also did not meet the other requirements of the exemption," 57 FR 37672 (1992). These "other requirements" focused on the nature of the duties making for "executive," "administrative" or "professional" employment. *See* 29 CFR §§ 541.1, 541.2, 541.3 (1995).

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[3](...continued)
merely rational in order to survive judicial scrutiny. We note, however, that the salary basis test fails to meet even the more deferential standard.

[4]The FLSA was initially extended to public employers only in 1974, *see*, 57 FR 37667 (1992), and has been enforced continuously as to public employers only since 1986, *see* Fair Labor Standards Amendments of 1985, Pub. Law No. 99-150, § 6.

The salary basis test is thus no more than a surrogate (and indeed, according to DOL, a superfluous) requirement. Its entire function is to serve as an indicator of otherwise-identifiable managerial status. Because this is the sole rationale of the test, it can and must be scrutinized according to whether it "distinguish[es] exempt from nonexempt employees," 57 FR 37670 (1992). In the public sector, because of the public accountability principle, it does not and cannot do so. This principle, DOL has acknowledged, "is derived from the desires of taxpayers that their government be accountable to them for expenditures from the public treasuries," and is aimed at forestalling "wasteful and abusive excesses." *Id.* at 37676. An obvious consequence of the principle is that employees like the present respondents, whose duties are indisputably managerial in nature, cannot be paid with public funds for time not spent on their job duties. This means that an employee who misses work for some reason and has exhausted the applicable leave time cannot be paid for the period during which he misses work. But because DOL's salary basis test requires that a managerial employee "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," 29 CFR § 541.118(a) (1995), a public sector executive is entitled to overtime if his pay is reduced to account for time he has not worked.

The salary basis test, applied to public employees as a supposed indicator of their managerial status, is thus so irrational that it cannot survive even the most deferential scrutiny. The DOL, in promulgating a regulation permitting public employers to reduce an employee's pay "for absences for personal reasons or because of illness or injury of less than one day," *see*, 29 CFR § 541.5d(a) (1995), recognized this. The agency acknowledged that the salary basis test "could not operate in a manner that effectively distinguished exempt from nonexempt public

employees," 57 FR 37672, although it declined to follow its own reasoning and declare the entire test inapplicable to government employers. The test thus remains in effect, with the result of this case -- more than $14 million in government liability -- by no means atypical. Since the lower courts generally have been unwilling to invalidate the entire test, it is time for this Court to scrutinize the salary basis test and determine what, if anything, supports its application to state and local government.

An additional reason for this Court's scrutiny lies in the APA requirement that agency regulations comport with Congressional intent. No one seriously contends that Congress, in extending the FLSA to state and local government, intended anything but that government employees whose duties are executive, administrative or professional in nature would come within the managerial exemption. Petitioners (pp 19-20) cite legislative history to this effect, and DOL itself concedes that "it is clear from a plain reading of FLSA's legislative history in 1974 * * * that Congress intended for the [managerial] exemption to be available for public sector employees." 57 FR 37672 (1992). The continued existence of the salary basis test, however, in conjunction with the public accountability principle, guarantees that the exemption will *not* be available. In the public sector, where taxpayers' money cannot be given to government employees who have not earned it, managerial status and susceptibility to a reduction in salary for time not spent working are wholly compatible. The salary basis test, however, defeats that managerial status and renders governments liable for overtime pay even to their most highly compensated executives. It thus neutralizes the public accountability principle. If this was truly Congress's intent in extending the salary basis test to the public sector, it is incumbent upon this Court to say so definitively.

Application of the salary basis test to the public sector was, as the outcome below demonstrates, a bad idea. The test does not do what it is supposed to do, undermines a principle central to the operation of state and local government in America and exposes public employers to enormous liability for "overtime" for employees who are not entitled to it under the FLSA. No circuit court has taken a careful look at both root and branch of the salary basis test. The extraordinary abdication of the Second Circuit, in its decision below, suggests that no circuit court is willing or likely to do so. It is up to this Court to undertake definitive scrutiny of the test.

II. This Court should resolve the conflict between the circuits with respect to the DOL regulation applying the salary basis test to a public employee's appearance as a witness in a case in which he has an interest.

Even if this Court does not grant certiorari to undertake a review of the salary basis test *in toto*, it should accept this case to review New York City's policies in light of DOL regulations applying the salary basis test in the three specific circumstances which led to New York City's massive liability in the present case. Among these is New York City's policy that employees must use leave balances or lose salary for court appearances as a witness when they or a relative has a personal interest in the proceeding.[5] The Second Circuit's adoption of the district court's conclusion that "[t]his directly conflicts with the DOL's regulations disallowing deductions from compensation for

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[5]Many states have similar policies. *See, e.g.*, Cal Gov't Code § 1230.1 (West 1996); Ohio Rev. Code Ann. § 124.135 (Anderson 1996); Ga Comp. R. & Regs. § 18.600 (1995); N.J. Admin. Code tit. 4A, § 6-1.20 (1996); N.Y. Comp. Codes R. and Regs. tit. 4, § 21.9 (1996); N.C. Admin. Code tit. 25, r. 1E.1002 (1995).

absences caused by attendance as a witness" (A18) itself conflicts not only with the public accountability principle but also with DOL's own announced policy and with a decision of the Fourth Circuit.

In *Shockley v City of Newport News*, 997 F2d 18 (4th Cir 1993), the Fourth Circuit rejected the claim of municipal employees who contended that they were not subject to the FLSA overtime exemption because city policy required reduction in salary for attendance as a party at trial. A DOL regulation provides that, for employees who are paid on a salary basis, "[d]eductions may not be made for absences of any employee caused by * * * attendance as a witness * * *." 29 CFR § 541.118(a)(4) (1995). Nonetheless, said the Fourth Circuit, a distinction must be made between attendance as a witness and attendance as a party. The former "involve[s] performance of a civic duty," whereas "[a]ttendance as a party does not." 997 F2d at 24. Thus, the court concluded, "reductions in pay for attendance as a party do not run afoul of § 541.118(a)(4)." *Id.*

Significantly, DOL itself takes the same approach. A 1993 Opinion Letter responded to the question of whether an employer "can implement a policy to dock the pay of exempt employees who are absent from work * * * for the purpose of taking part in Court proceedings where the employees are not under statutory or other legal compulsion to be present in Court." Opinion Letter, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (December 2, 1993), at 2. Notwithstanding the text of the regulation, DOL opined "that absences from work to attend Court proceedings where the employee is under no legal compulsion to be present in Court are absences for personal reasons," for which deductions may be made. *Id.* at 2-3.

Obviously, a contrary rule also violates the public accountability principle. It is hardly consistent with this principle for an employee to receive a government subsidy for absences due to court appearances in a case that he or a relative has initiated, or in which he or a relative otherwise has a personal stake. As the DOL opinion letter says, this time spent not working is attributable to "personal reasons." Pay for such time would be no more than a gift of state money to an employee.

Despite the foregoing authority and reasoning, the district court, without any supporting reasoning, found a discrepancy between New York City's policy "and the DOL's definition of 'salary basis' in regard to penalties and absences for attendance at court proceedings" (A19). The Second Circuit added nothing to this discussion. Its decision, however, now stands in conflict with the Fourth Circuit's holding in *Shockley*, has subjected New York City to millions of dollars in overtime liability, and threatens to subject other public employers to the same. Only this Court can resolve the conflict and settle the confusions in this area, and it should grant certiorari in order to do so.

III. This Court should grant certiorari in order to determine whether New York City's restriction on paid military leave violates the salary basis test.

The question of the interaction between DOL's prohibition against reduction in a managerial employee's salary for absences due to "temporary military leave" and New York City's policy with respect to such leave is also worthy of this Court's review. In this area, New York City does not dispute the validity of the specific regulation, other than as a component of the overall salary basis test. Pursuant to state statute, New York City, like other public employers in New York State, must pay its employees "for any and all periods of absence while engaged in the

performance of ordered military duty, * * * not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year * * *." N.Y. Military Law § 242(5) (McKinney 1990). Most states offer their employees the same amount of or less military leave.[6]

The district court's conclusion, adopted by the Second Circuit, that New York City's "limitation on paid military leave presents the potential for employees on temporary military leave to take leave without pay" in violation of the salary basis test, deserves this Court's scrutiny. New York City (and most States) do not dispute that public employees should receive temporary military leave. The question in this case is whether the thirty or twenty-two days granted by petitioners is sufficient to satisfy the requirements of the salary basis test as to "temporary" military leave.

DOL nowhere defines "temporary" military leave. Other aspects of federal law, however, as well as common sense, suggest that "temporary" leave can be neither infinite nor indefinite in duration. Rather, temporary military leave is most readily conceived as an accommodation to reservists or members of the National Guard, who after all are the only persons whose military obligations are truly temporary. As petitioners note (Br, p 22), federal statutes require only fourteen days per year of active duty training for reservists and fifteen days of active duty training for members of the National Guard. 32 CFR § 101.5(a)(1) (1995); 32 USC § 502(a) (Supp. 1996). Moreover,

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[6]Only three other States grant more paid military leave than New York, with most granting fifteen to twenty days of paid leave. *See* Uniformed Services Almanac, Inc., *National Guard Almanac*, 72-87 (1995); "State Policies," *The Officer*, February 1995, at 98-99.

federal employees are granted paid military leave for no more than fifteen calendar days per year. *See*, 5 USC § 6323(a)(1) (1996).

The obvious inference is that twenty-two -- and indeed, fifteen -- days of annual paid military leave is sufficient to meet the requirements of the salary basis test. Leave for a longer period cannot be called "temporary." Yet the Second Circuit -- the only circuit court to have expressed an opinion on this matter -- has held that any government employer's limitation on the duration of "temporary" military leave runs afoul of the salary basis test and subjects a public employer to liability for overtime pay to all employees subject to this limitation. Before such liability is finally imposed, this Court, even if it does not review the overall applicability of the salary basis test to public employers, should scrutinize whether New York City's restriction on paid military leave violates DOL's prohibition of deductions in managerial salary for "temporary" military leave.

IV. This Court should grant certiorari to determine whether a public employer's policy of making deductions in salary for disciplinary reasons correctly subjected it to loss of the overtime exemptions for its managerial employees.

Even if this Court does not accept this case in order to determine the applicability of the overall salary basis test to public employees, it should grant certiorari to review the Second Circuit's determination that a government employer's use of salary deductions as a means of disciplining its managerial employees deprives the employer of the FLSA overtime exemption. The power to make disciplinary salary deductions is central to the public accountability principle. Before state and local governments can be deprived of it, this Court should

scrutinize the DOL's policy and pass on whether it is justified by the reasons proffered by its proponents.

Like the DOL regulation that deprives government employers of the managerial overtime exemption if they have policies limiting paid temporary military leave or reducing salary for court appearances on personal matters, the DOL policy sharply limiting disciplinary deductions[7] illustrates the fallacy of applying the salary basis test at all to government employers. Because of the public accountability principle, the susceptibility of a highly-compensated public official with indisputably managerial duties to a disciplinary salary deduction indicates nothing about whether he is "employed in a bona fide executive, administrative, or professional capacity." The answer offered by the Second Circuit, adopting without elaboration the district court's reasoning, is that "plaintiffs are subject to penalties for infractions of safety rules not of major significance. A more direct variance by defendants from the DOL regulations defining 'salary basis' is difficult to fathom" (A18). But of course, this answers nothing. If "the DOL regulations defining 'salary basis'" are irrational as applied to public employers, it is up to the courts to say so. The Second Circuit has abdicated its responsibility to resolve the issue, expressly leaving its resolution to this Court.

Some commentators, including at least one circuit court, have suggested that there is no clash between the DOL policy on disciplinary deductions and the public accountability principle.

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[7]Although there is no regulation expressly limiting disciplinary deductions, DOL provides that "[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 CFR § 541.118(a)(5) (1995). Penalties for other infractions, the court below held, deprive an employer of the overtime exemption.

Thus, the Seventh Circuit characterized as "pretty feeble" the implication, in either the public or private sector, "that if an employer measures out discipline in the form of fractions of a weekly salary * * * the employee is really being paid on an hourly basis." *Mueller v Reich*, 54 F3d 438, 443 (7th Cir), *petition for cert filed*, 64 USLW 3297 (October 24, 1995), (No. 95-586). But, that court said, the unavailability of disciplinary deductions does not make for payment without work in violation of the public accountability principle. *Id.* at 442-43. Moreover, the court added, "all the challenged rule prevents is suspensions without pay for less than a week," while leaving public employers free to exercise a variety of alternative sanctions. *Id.* at 443.

DOL itself takes the same view. At the time it promulgated the rule permitting partial-day docking by government employers without loss of the overtime exemption, it professed itself unable to discern "a sufficient basis for distinguishing between the public and private sectors with respect to" disciplinary deductions. 57 Fed Reg 37674 (1992). DOL stated that "[a]lthough public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable." *Id.* In any event, DOL added, "other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available." *Id.*

In the view of the amici States, this demonstrates a disregard for the realities of public employment. First, there is no question that incompetence or indifference on the job implicates the public accountability principle fully as much as unexcused absence from work. A managerial employee who sleeps on the job is fully as offensive to taxpayers demanding accountability

as a managerial employee who sleeps late. Moreover, the view of the Seventh Circuit and DOL grossly overstates the ease with which tenured public employees can be dismissed and, as petitioners observe (p 14), overlooks the principle of "progressive discipline" -- the judicially-enforceable requirement that the punishment of a public employee be proportionate to the offense. For most significant workplace offenses by public employees, suspension without pay for a week or more is too great a penalty, while the "official reprimands" counseled by DOL are meaningless wrist-slaps.

Thus, the DOL prohibition against disciplinary deductions collides directly with the public accountability principle. This case gives this Court an opportunity to apply that principle, universally accepted as central to the operations of state and local governments in America, to both DOL's overall salary basis test and its rules elaborating that test. This Court should not defer the chance to address and resolve these important issues.

V. This Court should retain this case for summary disposition and remand after resolving in *Auer v Robbins* the questions of whether an actual impermissible deduction is required for violation of the salary basis test and whether isolated instances of impermissible deductions subject a government employer to loss of the overtime exemption for an entire class of employees.

Two important questions raised by this case are squarely presented in *Auer v Robbins*, 65 F3d 702 (8th Cir 1995), *cert. granted*, 116 S Ct 2545 (1996). First, as noted by petitioners (pp 34-35), the Second Circuit, unlike the Eighth Circuit in *Auer*, held that the mere possibility of an impermissible deduction in an employee's compensation is sufficient to cause an

employer to lose the overtime exemption. The Eighth Circuit, by contrast, held that an actual deduction from salary must occur before the salary basis test is violated. Second, *Auer* raises the question of whether, when the "actual deduction" rule applies and an otherwise-exempt employee suffers impermissible deductions, a government employer must lose the overtime exemption for an entire class of employees, or instead may employ the DOL "window of correction" when "the employer reimburses the employee for such deductions and promises to comply in the future," 29 CFR § 541.118(a)(6) (1995). As the Court's grant of certiorari in *Auer* presumably indicates, the resolution of these issues is critical to all government employers, regardless of how the other questions raised by the present case are answered. Thus, the Court should at the very least retain this case until *Auer* is decided.

In the present case, the willingness of the Second Circuit, adopting the district court's decision, to conclude "that whether or not penalties have actually been imposed is immaterial to finding that compensation is 'subject to reduction'" (A22) meant that New York City faces millions of dollars in liability because some managerial employee *may* someday face a reduction in salary as a result of taking more than 22 days of military leave in a year or taking time off from work to appear as a witness in his own lawsuit. Here, as in *Auer,* the split in the circuits on this issue (*see*, Petition p 34)[8] and the huge financial consequences of the outcome call for this Court's intervention.

Similarly, the present case, like *Auer,* raises the question of what the remedy should be when the law is that an actual deduction from salary must occur to give rise to employer

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[8]As petitioners note (p 36), DOL itself rejects the "theoretical possibility" approach.

liability and an otherwise-exempt employee suffers a deduction that is impermissible under the salary basis test. In *Auer*, the employee-petitioners urge that the isolated incident of a two-day disciplinary suspension of a single St. Louis police sergeant deprives St. Louis of the overtime exemption not only for that employee but also for all sergeants in its police department. In the present case, as New York City notes (Petition, p 35), a single disciplinary penalty of $258 for one managerial employee ends the overtime exemption for both that employee and all other employees in that class. This case and *Auer* alike demonstrate the need for this Court finally to determine whether isolated impermissible deductions can be cured by government employers, or instead must subject such employers to massive financial liability.

Auer will presumably resolve at least one and perhaps both of the issues it shares with the present case. Thus, even if the Court does not now grant certiorari in this case, it should hold the petition for summary disposition after it decides *Auer*.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: Albany, New York
August 28, 1996

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
The Capitol
120 Broadway
Albany, NY 12224
(212) 416-8000

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel

(5)

No. 96-152

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In The

Supreme Court of the United States

October Term, 1995

RUDOLPH W. GIULIANI
as Mayor of the City of New York, *et al.*,

Petitioners,

- against -

HAROLD YOURMAN, *et al., etc.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI BY AMICI CURIAE NATIONAL LEAGUE OF CITIES, INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NEW YORK CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS

LOUISE H. RENNE
San Francisco City Attorney
JONATHAN V. HOLTZMAN*
Chief Deputy City Attorney
DARREN W. LEE
Deputy City Attorney
1390 Market Street,
5th Floor
San Francisco, CA 94102
(415) 554-4283

ARTHUR A. HARTINGER
LIEBERT, CASSIDY & FRIERSON
49 Stevenson Street
Suite 1050
San Francisco, CA 94105
(415) 546-6100

*Attorney of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION

This Fair Labor Standards Act (FLSA) case presents agency rulemaking and constitutional issues of enormous importance to public employers across the United States. The seemingly obscure administrative regulation at issue, 29 C.F.R. section 541.118 (the "salary basis test"), has generated hundreds of public sector cases.[1] Conflicting holdings throughout the federal courts have resulted, all because of an *admitted mistake* by the United States Department of Labor (DOL). In DOL's own words: "The regulations were . . . *out of harmony with the intent of the [FLSA]* because State and local governments could not practically avail themselves of the exemptions intended by Congress, and thus were *inappropriate* as applied in the public sector." 57 Fed. Reg. 37666, 37672 (Aug. 19, 1992) (emphasis added).

Despite this significant admission, DOL has *never* conducted rulemaking to determine whether the salary basis test appropriately distinguishes between white collar and non-exempt employees in the public sector. Although DOL conducted limited rulemaking in 1991-1992, the Department expressly refused to consider numerous subparts of the test. Thus, since the FLSA was extended to public entities in 1986 as a result of the

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[1] With certain exceptions, the salary basis test requires exempt employees to be paid a weekly predetermined amount of compensation, "without regard to the number of days or hours worked." 29 C.F.R. § 541.118(a). The test has wreaked havoc among public entities because public employees traditionally are paid *only* for time actually worked, regardless of rank or stature.

Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), DOL has never gathered evidence or conducted any analysis about whether the salary test subparts at issue in this case appropriately apply in the public sector.

Amici recognize the broad deference usually accorded administrative regulations. But the doctrine of judicial deference is contingent upon the agency carrying out its essential rulemaking responsibilities. At a minimum, federal agencies must make a conscious decision about their regulations, and articulate their rationale based on *some* evidence.

The extension of the FLSA to millions of public employees in 1986 was surely an event of sufficient magnitude to trigger an obligation by DOL to determine whether the salary basis concept had some meaningful and appropriate effect in the public sector. Yet, the astonishing truth here is that DOL has done nothing to address this key issue. The salary basis test, which was enacted in the 1940s and 1950s, was simply allowed to apply in the public sector *by inaction*.

The rulemaking record here demonstrates unequivocally that DOL has violated the fundamental rulemaking principles confirmed by the Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Further, DOL has ignored the federalist principles emphasized by the Court in *Bowen v. American Hospital*, 476 U.S. 610 (1986). These principles prohibit federal agencies from impinging on matters of local concern, such as the manner in which local employees are disciplined, without doing one very simple thing: they must

articulate a justification founded on statutory authority and an administrative record. This is not a difficult burden under most circumstances. But DOL has openly rejected this responsibility, in direct violation of *Bowen*, and at an enormous cost to state and local government.[2]

Amici urge the Court to grant certiorari to correct DOL's regulatory mismanagement, and to clarify DOL's ongoing rulemaking responsibilities under the FLSA.

II. INTEREST OF AMICI CURIAE

Amicus curiae National League of Cities (NLC) is the country's oldest and largest organization serving municipal government. Its direct members include more than 1,400 cities of all sizes and 49 state municipal organizations, with a combined membership of over 17,000 municipalities. As a membership organization of general purpose local governments, NLC is dedicated to advancing the interests of municipal government at both the state and national level. It has a compelling interest in legal issues affecting the powers and responsibilities of local governments, and its members have been directly impacted by the issues presented in this case.

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[2] Amici are aware that salary basis cases against state and local governments across the Country have cost public entities millions of dollars in backpay judgments, settlements and defense costs. In this case alone, the employees claim that their judgment amounts to $14 million in backpay and liquidated damages. (Respondents' Opp. Br., p. 7, n.9.)

The interests of the other seven amici curiae represented in this brief are listed in Appendix B.[3]

III. RULEMAKING RECORD

The administrative rule at issue in this case – the salary basis test – is not found anywhere in the FLSA itself. Rather, the rule was created by DOL and is contained entirely in DOL's administrative regulations. *See* 29 C.F.R. § 541.118. The FLSA mandates simply that its overtime provisions "*shall not apply* with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity. . . . " 29 U.S.C. § 213(a)(1). Congress delegated to DOL the responsibility to define (but not to destroy) these "white collar exemptions." *Id.* The administrative record underlying the salary basis test is therefore critical.

DOL developed the salary test in 1940 based upon hearings showing white collar employees in industries "then-subject to the FLSA" – *i.e.*, private industry – "were nearly universally paid on a salary basis." 57 Fed. Reg. at 37672. "These fact based inquiries, conducted before the public sector became subject to the FLSA, did not include an examination of prevailing governmental pay practices." *Id.* According to DOL, the very fact that white collar employees were "almost universally paid on a salary basis" in the private sector constituted the principal rationale for applying this test for exempt status. *Id.* at 37672.

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[3] All parties have consented to amici curiae filing this brief. See Appendix A.

The tortured history of the salary basis test in the public sector began in November 1985, when DOL issued an Advanced Notice of Proposed Rulemaking ("ANPR") soliciting views on 29 C.F.R. Part 541 regulations. DOL soon learned through commentary that because of public pay practices, the existing salary test destroyed the FLSA's white collar exemptions in the public sector. 57 Fed. Reg. at 37667.

Five months later, in connection with the Fair Labor Standards Amendments of 1985, DOL proposed rules implementing special provisions applicable to local and state governments. 51 Fed. Reg. 13402 (Apr. 18, 1986). After receiving comments, DOL acknowledged that the salary basis test was flawed, but stated: "In light of the separate rulemaking process with respect to Part 541, it would not be appropriate for the Department to address this issue. . . . " 52 Fed. Reg. 2019 (Jan. 16, 1987). "[T]he Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987." *Id.*

Despite its promise, DOL conducted *no* rulemaking on this issue over the next four years. "In the meanwhile, public employers and public employees found themselves in complex litigation trying to grapple with these pressing issues on which the DOL should have provided guidance, but did not." *SEIU, Local 102 v. County of San Diego* ("SEIU"), 60 F.3d 1346, 1359 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 734 (Jan. 16, 1996).

Recognizing that its own delay might lead to the improper application of the salary basis test to public entities, DOL did issue a stopgap letter ruling in January 1987. The ruling noted that state and local governments

have "statutory provisions which prohibit any employee from being paid for time not actually worked," and that federal employees are also subject to such rules. DOL stated: "While consideration is being given to proposed changes in the regulations, a *non-enforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees.*" 57 Fed. Reg. at 37668 (emphasis added).

Unfortunately, DOL failed to amend or suspend its regulations, as it plainly should have. Instead, after recognizing a serious problem and adopting a non-enforcement policy, DOL left the door open to private lawsuits. "In effect, the DOL abdicated its central role in this evolving process and punted, sending the salary basis test and the overtime compensation issue to the courts." *SEIU*, 60 F.3d at 1357.

"In the tumultuous wake" of *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), "DOL conceded that its nonenforcement policy and its deference to the courts, coupled with its own failure to act, had resulted in an open Pandora's box." *SEIU*, 60 F.3d at 1358. In 1991, DOL attempted to correct its regulatory lapse through emergency rulemaking. Through an Interim Final Rule ("IFR"), DOL waived the normal notice and comment period in recognition that the salary test "could well result in enormous, unforeseen liability of such governments and may threaten their fiscal integrity." 56 Fed. Reg. 45824, 45825 (Sep. 6, 1991). The IFR authorized deductions from salary and leave balances, thereby eliminating the effect of *Abshire*, but left intact the rest of the salary test.

In August 1992, DOL published a Final Rule on the salary test. With certain exceptions, the Final Rule is virtually identical to the IFR. *Compare* 29 C.F.R. § 541.5d, 57 Fed. Reg. at 37677 *with* the IFR, 56 Fed. Reg. at 45826.

In the 1992 Final Rule, DOL made some extremely significant admissions.

1. Whereas private employers had the ability to change their practices to conform, "public sector pay policies . . . evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked . . . " 57 Fed. Reg. at 37667.

2. When Congress first amended the FLSA to apply to public entities in 1974, it manifested a clear intent that the executive, administrative and professional exemptions apply to public employment. *Id.* at 37667, 37672. "Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked," these systems would fail the salary test. *Id.* at 37672.

3. When the FLSA first became applicable to local governments – "most" public employers had rules prohibiting employees, including highly paid employees, from receiving pay for time not actually worked, absent leave balances. As a result, they did not meet the salary test. Congress' silence in the 1985 amendments regarding this issue "is not indicative of an intent to make the . . . exemption[s] unavailable to public sector employers," because the issues regarding

the salary test were not "generally recognized" at the time. *Id.* at 37672.

4. Application of aspects of the salary basis test to the public sector "did not serve their intended purpose." "State and local governments were thus being inappropriately deprived" of such exemptions. *Id.* at 37670.

5. "In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the [FLSA] because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector." *Id.* at 37672.

In light of the admissions by DOL and the rulemaking record, the Ninth Circuit has concluded that the salary basis test, *in its entirety*, violated the Administrative Procedure Act ("APA"). *SEIU*, 60 F.3d 1346. The court concluded that DOL failed to render an "engaged interpretation of the statute," and instead "simply defaulted on its mandate to interpret the Fair Labor Standards Act. . . . " *Id.* at 1356. As the Court appropriately observed:

> [T]he DOL – which caused much of this sea of troubles – should not be surprised that we have determined its *nonenforcement regulatory vacuum*

> *to have been arbitrary, capricious, and thus an abuse of discretion, entitled to no deference at all.*

Id. at 1358-59 (emphasis added).[4]

In 1992, while amending the substance of the salary test – its requirement that a salary not be subject to deductions for partial day absences – DOL declined on procedural grounds to reconsider peripheral subsections of the test. *See, e.g.*, 57 Fed. Reg. at 37674 (the disciplinary suspension issue "was not open for comment"). Despite its duty to articulate a rationale for the test, DOL again approached the issue backwards: the Department asserted that comments during the 1992 rulemaking "failed to justify" eliminating the salary test in the public sector. Again, nowhere in the 1992 regulation or commentary did DOL articulate *any* rationale for applying the salary test in the public sector.

In April 1993, DOL published a notice stating its intention to carry out rulemaking by September 1993 concerning the white collar exemptions. 58 Fed. Reg. 24569 (Apr. 1993). The year passed without action by DOL.

In April 1994, the President's Chief of Staff, Leon Panetta, asked the Secretary of Labor to "undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make

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[4] In *McGuire v. City of Portland, Oregon*, ___ F.3d ___, 1996 WL 431720 (9th Cir., Aug. 2, 1996), the court of appeals recently held that the salary basis test was properly applied to public entities after September 1991. A petition for rehearing, with a suggestion for rehearing *en banc*, was filed in *McGuire* on August 16, 1996.

them workable in today's economy." (Appendix D, Ltr. from Panetta to Reich.)[5] Mr. Panetta also stated:

> [D]ue to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars.

DOL, however, never responded.

DOL's November 1994 regulatory agenda blamed "recent court rulings" for the confusion regarding its salary basis and other "white collar" regulations, and admitted that a "comprehensive review of [the white collar] regulations is both necessary and appropriate." DOL again promised rulemaking. 59 Fed. Reg. 57127, 57129 (Nov. 14, 1994). Again, the year passed with no action.

In May 1995, DOL issued another, almost identical agenda. 60 Fed. Reg. 23543, 23544 (May 8, 1995). DOL's November 1995 agenda also reiterated that "the regulations are still in need of updating and clarification." 60 Fed. Reg. 59608 (Nov. 28, 1995). Despite recognizing that its regulations are out of date, DOL again blamed the courts for inconsistent rulings. "[R]ecent court rulings have caused confusion as to what constitutes compliance with the regulations 'salary basis' criteria in both the public and private sectors." DOL added:

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[5] Amici respectfully request the Court to take judicial notice of this letter. *See* Fed. R. Evid. 201(f); *United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984).

> Legal developments in court cases are causing *progressive loss of control* of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. *Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension.* (*Id.*, emphasis added)

Most recently, on May 13, 1996, DOL again noted that its 1992 rulemaking was "limited," its regulations are therefore "still in need of updating and clarification," and that it continues to experience a "progressive loss of control over the regulations." 61 Fed. Reg. 23238 (May 13, 1996).

IV. REASONS WHY CERTIORARI SHOULD BE GRANTED

There are at least six reasons why the Court should grant certiorari: (a) to resolve the inconsistency among the circuit courts about the validity of the regulations; (b) to address the Second Circuit's conclusion that the Court's review is appropriate and inevitable; (c) to reaffirm the federalism principles last considered by the Court in *Bowen v. American Hospital Ass'n*; (d) to enforce DOL's statutory mandate to define and delimit the white collar exemptions, and to order its compliance with the Court's opinions concerning agency authority under the Administrative Procedure Act (APA); (e) to consider the constitutionality of the regulations as applied to public

entities; and (f) to ensure uniformity with *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545.

A. The Court Should Resolve The Inconsistency Among The Circuit Courts About The Validity Of The Regulations

A widespread divergence exists among and even within the circuit courts regarding the validity and application of DOL's salary basis regulations. For example, in *SEIU*, 60 F.3d 1346, the Ninth Circuit struck down the regulations, finding that DOL failed to render an "engaged interpretation of the statute," and instead "simply defaulted on its mandate to interpret the Fair Labor Standards Act. . . . " 60 F.3d at 1356. Other circuits, such as the Second, Seventh and D.C. Circuits, have deferred to DOL and sustained the validity of the regulations. *See Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *pet. for cert. filed*, 64 U.S.L.W. 2780 (Oct. 10, 1995); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993). Unless the Court accepts certiorari to resolve the issue, the validity of DOL's regulations will remain uncertain, and public entities will continue to face lawsuits and unknown obligations.[6]

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[6] The respondents in this case suggest that there is no real conflict among the circuits because the earlier circuit court decisions invalidating the regulations concerned DOL's regulations prior to its 1991 rulemaking. (Respondents' Br. In Opp. to Pet. for Cert., 14-15.) However, the liability period in this case, and in many others pending around the Country, encompasses a period prior to September 1991. While the respondents believe that the millions of dollars at stake in this and other cases "is not worthy" of Supreme Court review, this

B. The Second Circuit Specifically Contemplated Supreme Court Review

The Second Circuit invited Supreme Court review. The court of appeals expressly stated that it left "the ultimate resolution of the statutory dispute to the Supreme Court or the Congress." *Yourman v. Dinkins*, 84 F.3d 655, 656 (2nd Cir. 1996).

C. The Court Should Reaffirm The Federalism Principles Ignored By DOL

DOL continues to violate the principles of federalism confirmed by the Court ten years ago in *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 645 (1986).

When the federal government seeks to regulate matters traditionally entrusted to state and local governments, it must justify its regulation. *Bowen*, 476 U.S. at 645.

> [T]he propriety of the exertion of [an agency's] authority must be tested by its relation to the purpose of the [statutory] grant and with suitable regard to the principle that whenever the

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represents an enormous amount of unfunded liability that could have a direct impact on state and local public services. Further, challenges to the prospective validity of the regulations continue to be made, and DOL continues to abdicate its responsibility to conduct rulemaking. Certiorari is therefore particularly appropriate to ensure national uniformity regarding the regulations' validity and to enforce DOL's ongoing rulemaking responsibilities.

> federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

Id. at 645; *see also Florida v. United States*, 282 U.S. 194, 211-12 (1931).

Applying the salary test's disciplinary restriction to state and local employees is an exertion of federal power "within what would otherwise be the domain of state power." *Bowen*, at 645. Employee discipline is fundamental to the integrity of government. *See Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (affirming the compelling need to "maintain proper discipline in the public service"). The disciplinary restriction and other parts of the salary test directly affect established local personnel and payroll systems throughout the United States.

In general, public employees are covered by civil service "merit" systems. These systems are designed to prevent patronage appointments by requiring that employees be selected and separated from public service based on good cause. The requirement of good cause, in turn, has given rise to well-established, progressive disciplinary principles. In most cases, these principles require short suspensions before long suspensions. Indeed, arbitrators have reduced suspensions where lesser discipline was not first imposed.

Given these well-established principles, under *Bowen*, the initial question is not whether employers *are able* to conform their personnel systems to DOL regulations. Rather, *Bowen* requires courts *first* to consider whether DOL has articulated a solid reason founded in statutory

authority and an administrative record that would justify the federal government's requiring national uniformity on the issue of disciplinary suspensions, and the other requirements of the salary basis test, as applied to public entities.

The principles of *Bowen* make particular sense here. New York and other public agencies throughout the country have incurred massive unfunded liability to their highest paid employees because of DOL's inaction. That liability, and the cost of defending lawsuits such as this one, are borne by taxpayers. The costs are suffered too by those who rely on the essential services provided by states, cities and counties – services such as police and fire protection, hospitals, housing and street repair.

If federal agencies establish rules imposing liabilities that undermine these critical services, it is not too much to ask that the agencies articulate a solid reason founded either in the clear language of a statute, or, at very least, the clear intent of Congress.

D. DOL Must Be Directed To Do Its Job

By DOL's own admission, its regulations at issue in this case have created a nationwide "loss of control" over the white collar exemptions *mandated* by Congress. 60 Fed. Reg. 59608 (Nov. 28, 1995); 61 Fed. Reg. 23238 (May 13, 1996). Public agencies throughout the United States face lawsuits based on regulations that DOL itself declared did not comport with Congressional intent, and were inappropriate. 57 Fed. Reg. 37666 (Aug. 19, 1992).

DOL's failure to "define and delimit" the regulations violates its Congressional mandate. *See* 29 U.S.C. § 213(a)(1). DOL's failure to carry out its responsibilities continues to create unfunded liabilities and to harm public agencies.

Moreover, DOL's repeated requests for deference suggests that the agency either misunderstands the contours of its rulemaking authority, or is ignoring them. The Supreme Court should accept review to correct DOL's failure to adhere to the Court's fundamental rulemaking principles.

1. The Regulations Conflict With Congressional Intent

The most elemental principle of administrative rulemaking is that an agency cannot apply a statute the agency administers in a manner that eviscerates the statute. Any rule or regulation that cannot be harmonized with its authorizing Congressional act is a nullity. *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). A court *must* give effect to the unambiguously expressed intent of Congress. *Fort Stewart Schools v. Federal Labor Relations Auth'y*, 495 U.S. 641, 645 (1990).

Congress' intention that the white collar exemptions apply to public entities is beyond dispute. There is *no* evidence that Congress was even aware of the fact that the salary test, if applied in the public sector, would eliminate the white collar exemptions. Here, however, the very agency charged with interpreting the FLSA has admitted that applying the salary test to the public sector

cannot be squared with the statute or the expressed intent of Congress. *See SEIU*, 60 F.3d at 1353-54. Under these circumstances, the Second Circuit and other courts have erred in applying these regulations.

2. The Regulations Lack An Articulated Rationale

By not bothering even to state a rationale for its regulations, DOL has violated the principles of rulemaking established by the Supreme Court in *Motor Vehicles Manufacturers Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983); and *Chevron*, 467 U.S. 837. These cases establish that agency interpretations of a statute may be upheld *only* where courts determine that an agency's interpretations represent a reasonable accommodation of competing interests, and that the agency has considered the problem and made a conscious decision based on evidence. In various amici curiae briefs in other cases, DOL suggests that it is not bound by these Supreme Court authorities, and that courts must always defer to its regulatory interpretations based on authorities holding that agency actions are entitled to deference. The Court should grant certiorari to apply its previous APA decisions, and remind DOL that its actions are subject to the principles established by the Court.

3. DOL's Delay In Rulemaking In Itself Violates The APA

DOL has violated its duty to define and delimit the white collar exemptions on an ongoing basis. The Court

has characterized the white collar exemptions as "part of a legislative code subject to continuous revision with the changing course of events." *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944). Various authorities hold that the unreasonable delay by an administrative agency in satisfying the mandates of its authorizing statute violates the APA. *See* 5 U.S.C. § 555(b) (agencies must conclude matters before them within a reasonable time); 5 U.S.C. § 706(1) (reviewing court may compel an agency action unlawfully withheld or unreasonably delayed); *Campesinos Unidos v. United States Dept. of Labor*, 803 F.2d 1063, 1068 n.2 (9th Cir. 1986). A delay of four or five years has been held unreasonable. *See, e.g., MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980).

This Court has not yet addressed the effect of delay by an administrative agency in carrying out its statutory mandate. The Court should therefore grant certiorari to consider whether DOL's ten year delay meets APA requirements.

E. The Court Should Consider The Validity Of The Regulations Under The Tenth Amendment

This case presents compelling issues under the Tenth Amendment that have not yet been addressed by the Court. The last decision by the Court concerning the FLSA and the Tenth Amendment was *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court has never considered the impact of the Tenth Amendment on DOL administrative regulations that impinge directly upon local systems of public accountability, including requirements that public employees only

be paid for time worked, and that local officials shall have discretion to impose disciplinary suspensions of any duration. New York's arguments under the Tenth Amendment deserve consideration by the Court.

F. The Court Should Grant Certiorari To Ensure Uniformity With *Auer v. Robbins*

The Court granted certiorari in another salary basis case that raises similar issues. *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996). The Court should grant certiorari in this case to ensure consistency with the Court's eventual decision in *Auer*.

The court in *Auer* did not reach the validity of the salary regulations because it concluded that the defendants met the requirements under the regulations. However, the parties in *Auer* did raise APA and Tenth Amendment arguments very similar to those raised here.

It is critical for the Supreme Court to resolve the validity of the regulations *before* it determines their proper application. This will avoid a gross injustice such as that suffered by public entities after *Abshire v. County of Kern*. Following *Abshire*, circuit courts around the Country began to issue opinions concerning the *application* of the regulations. For five years, public entities faced numerous lawsuits and paid out millions of dollars based on regulations that were later declared invalid by the court in *SEIU*.

To avoid this unjust result, the Court should grant certiorari to ensure that the validity of the regulations is

fully considered before the Court issues a decision concerning how the regulations should apply. At a minimum, the Court should hold its decision on New York's petition until the Court resolves the issues in *Auer*.

V. CONCLUSION

The Court should grant New York's petition for certiorari.

DATED: August 29, 1996

Respectfully Submitted,

LOUISE H. RENNE
San Francisco City Attorney
JONATHAN V. HOLTZMAN*
Chief Deputy City Attorney
DARREN W. LEE
Deputy City Attorney

LIEBERT, CASSIDY & FRIERSON
ARTHUR A. HARTINGER

Attorneys for Amici Curiae

*Attorney of Record

APPENDIX A

The City of New York [SEAL]

LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007

PAUL A. CROTTY
Corporation Counsel
(212) 788-1072

August 21, 1996

Darren W. Lee
Deputy City Attorney
Office of the City Attorney
1390 Market Street, 5th Floor
San Francisco, California 94102-5408

Re: *Giuliani, et al. vs. Yourman, et al.*

Dear Mr. Lee:

The petitioners for a Writ of Certiorari in the above-referenced case hereby consent, pursuant to Supreme Court Rule 36, to the filing of an *amicus curiae* brief by the National League of Cities, *et al.*

Very truly yours,

/s/ Kristin M. Helmers
KRISTIN M. HELMERS
Assistant Chief
Appeals Division

cc: Joan Stern Kiok, Esq.

LAW OFFICES OF
JOAN STERN KIOK
26 BROADWAY – 24TH FLOOR
NEW YORK, NEW YORK 10004-1801

TEL. (212) 747-1414 *FAX (212) 747-1683*

August 21, 1996

Darren W. Lee, Esq.
Deputy City Attorney
Office of the City Attorney
1390 Market Street, 5th Floor
San Francisco, Calif. 94102-5408

Re: *Giuliani v. Yourman*
No. 96-152

Dear Mr. Lee:

Pursuant to your request, respondents hereby consent to the filing of a brief *amicus curiae* by the National League of Cities, *et al.* in support of the Petition for *Certiorari*.

Sincerely yours,

/s/ Joan Stern Kiok
Joan Stern Kiok

c: Kristin M. Helmers
Asst. Chief, Appeals Div.
New York City Law Department

APPENDIX B

INTERESTS REPRESENTED BY AMICI

Government Finance Officers Association

The Government Finance Officers Association (GFOA) is the professional association that represents state and local government finance officials. Its over 12,800 members are the nation's treasurers, finance directors, budget officers, auditors and pension fund administrators. GFOA's mission is to enhance and promote the professional management of governmental financial resources by identifying, developing and advancing fiscal strategies, policies and practices for the public benefit.

International City/County Management Association

The International City/County Management Association (ICMA) is the professional and educational association for appointed administrators and assistant administrators in local government. Its purposes are to enhance the quality of local government and to support and assist professional local administrators in the United States and other countries.

International Municipal Lawyers Association

The International Municipal Lawyers Association (IMLA) is a non-profit, non-partisan organization whose membership includes over 1,500 municipalities. Through local government membership, more than 17,000 attorneys are involved in MIMLO activities. Since 1935, IMLA has helped local government cut legal costs and

research time by serving as a unique national research center, clearinghouse on municipal legal information, municipal publishing house and advocate for the rights of local government.

International Personnel Management Association

The International Personnel Management Association (IPMA) represents more than 1,300 public sector agencies, including personnel departments, civil service commissions and merit system boards at the federal, state and local levels of government. The IPMA also represents over 65,000 individuals, primarily human resource professionals and managers in the public sector and educators in the fields of personnel management and public administration. IPMA's objective is to provide a focus and a forum for the discussion and exchange of views among human resource professionals throughout the United States and abroad.

National Association Of Counties

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Through its membership, urban, suburban and rural counties join together to build effective, responsive county governments. There are 3,043 counties spread across America in all but two states (Connecticut and Rhode Island) and another 28 consolidated city-county governments. Well over one half of all counties are members of NACo. Counties provide a multitude of services and have over 2.2 million

employees in administrative, executive, professional, technical and clerical positions. Each month, counties spend over $4.7 billion to compensate their employees.

National Public Employer Labor Relations Association

The National Public Employer Labor Relations Association (N-PELRA) is a 2,000-member national organization of labor and employee relations professionals who represent state and local governments. It has 15 state chapters and its members negotiate contracts with unions representing over 5 million public employees.

New York State Conference of Mayors and Municipal Officials

The New York State Conference of Mayors and Municipal Officials (NYCOM) is a not-for-profit, voluntary membership association consisting of all of the State's 62 cities and 490 of its 557 villages, thereby representing the great majority of such municipalities. New City is a NYCOM member.

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[SEAL]
THE DIRECTOR

APR 14 1994

Honorable Robert Reich
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

It has recently come to my attention that the section 541 regulations of the Fair Labor Standards Act (FLSA), which govern the payment of overtime, are currently the subject of numerous court cases involving employers and employees in the public sector. There is some prospect that similar court cases will continue to arise until the present regulations are reworked to take into account today's highly-educated, service-oriented workforce. The court cases suggest that, due to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars. I understand that your staff is fully aware of this issue.

I would appreciate it if the Department of Labor would undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy. I

also would urge you to work with the Office of Personnel Management (OPM) to ensure consistency, to the degree possible, between your Department's regulations and OPM's regulations as they apply to public sector employees.

My staff would be pleased to work with your staff in framing the scope of this review. I think such an undertaking would be an excellent good government exercise. It would dovetail with your effort to improve and streamline the Department's enforcement of Federal labor laws and the Department's quest to ready the American worker and workplace for the 21st Century.

Thank you.

Sincerely,

Original Signed By
Leon E. Panetta
Leon E. Panetta
Director

Supreme Court, U.S.
FILED
SEP 11 1996
CLERK

No. 96-152

SUPREME COURT OF THE UNITED STATES
October Term, 1996

RUDOLPH W. GIULIANI,
as Mayor of the City of New York, et al.,

Petitioners,

- against -

HAROLD YOURMAN, et al., etc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

PAUL A. CROTTY
Corporation Counsel of the
City of New York,
Attorney for Petitioners,
100 Church Street,
New York, New York 10007.
(212) 788-1035

LEONARD J. KOERNER,*
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.
* Attorney of Record.

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THE VALIDITY OF EACH OF THE FIVE COMPONENTS OF THE SALARY BASIS TEST, EXCEPT THAT CONCERNING JURY DUTY, IS AT ISSUE HERE.

The validity of the jury duty component of the salary basis test is not at issue here because petitioner's policies concerning jury duty have at all times been consistent with the salary basis test. As to the other four components of the salary basis test (Petition at 8-9), petitioners contend that each is arbitrary and capricious and contrary to the intent of Congress. Therefore, petitioners contend, if this Court agrees with petitioners about any one of those components, the entire salary basis test should be struck down because the federal Department of Labor ("DOL") drafted the entire test as a unit and for a Court to strike a part of it, but leave the remainder as the salary basis test, would be for the Court to draft its own salary basis test. This was the reasoning employed by the Ninth Circuit Court of Appeals in Service Employees International Union v. County of San Diego, 60 F3d 1346, 1354 (9th Cir, 1995), cert. denied, ___ US ___, 116 S Ct 774 (1996) ("SEIU") (Petition at 21).

On the other hand, if this Court does not agree with petitioners and SEIU but believes that each of the other four components of the salary basis test must be addressed individually, i.e., if this Court believes that even if one or more components of the salary basis test are struck down, the remaining components constitute a valid salary basis test, then the validity of each of the components must be addressed. Contrary to the assertions in respondents' brief in opposition to the petition (RBO at 1-3), the validity of the salary basis test's prohibition on partial-day docking, before the adoption of section 541.5d, is an issue here. The limitations period in this action extends back to April 1, 1989 (JA 20, 1740-51). Section 541.5d became valid either in September 1991 or August 1992 (Petition at 11-12). The

Third and Ninth Circuit Courts of Appeals have found the prohibition on partial-day docking invalid. Balgowan v. State of New Jersey, slip op., No. 95-5276 (3d Cir, May 16, 1996), vacated on unstated grounds, 84 F3d 656 (3d Cir, 1996); SEIU, supra, 60 F3d at 1352-53. We are aware of no Court of Appeals that has found the salary basis test valid prior to its amendment by section 541.5d.

As to the court attendance as a witness component (Petition at 8), it is obvious from looking at the jury duty, court attendance as a witness, and temporary military leave components of the salary basis test that in drafting the salary basis test many years ago DOL observed that in the private sector paid leave for these purposes was in DOL's opinion a good indicator of whether an individual was employed in a "bona fide executive, administrative or professional capacity." 29 USC section 213(a)(1). Paid leave for these purposes would seem to be based on the notion that the private employer would pick up the tab, so to speak, when the employee performed these civic duties. This notion has no application to modern State and local governments which operate under the public accountability principle (Petition at 10).

As to the temporary military leave component, as with the court attendance as a witness component, this component has the potential, at least, to deny the managerial exemption to every State and local government that does not grant unlimited paid miliary leave. The District Court's entire analysis of this component was that petitioners' policies on temporary military leave, which consistent with state law permit up to 30 calendar days or 22 working days of paid leave per year, "presents the potential for employees on temporary military leave to take leave without pay" (A 18-19). We assume that the District Court's thinking was that if an employee had exhausted his or her paid military leave, was on unpaid military leave Monday through

worked on Thursday and Friday and thus was paid only for two days, rather than the entire week, there would be a "violation" of the salary basis test. This is an irrational means of determining whether someone is employed in a "bona fide executive, administrative or professional capacity" and this analysis deprives State and local governments of the managerial exemption. The other three District Courts in New York that have addressed this question have concluded that the temporary military leave component is irrational. Close v. State of New York, slip op., No. 94-CV-0906 (NDNY, February 13, 1996); Meringolo v. City of New York, 908 F Supp 160, 167-68 (SDNY, 1995); McCloskey v. Triborough Bridge & Tunnel Authority, 903 F Supp 558, 566-67 (SDNY, 1995). The irrationality of the temporary military leave component is all the greater because the overwhelming majority of employees are not members of the Reserves or National Guard. Yet, in the view of respondents and the lower Courts herein, because they could be "subject to" reductions in salary if they were and if the above possibility occurred, no employee of petitioners can come within the managerial exemption.

The irrationality of the disciplinary component was addressed in the Petition and we briefly address here a few of the points in respondents' brief in opposition. Respondents argue, on the actual deduction/theoretical possibility issue, that it makes no sense for the managerial exemption to be lost only for the disciplined employee, rather than the entire class of employees of which that employee is a member (RBO at 17). The alternative, of course, is that the exemption is lost for the entire class because one member of the class commits a disciplinary infraction and is disciplined in a manner inconsistent with the salary basis test, which of course is a windfall for the entire class that would not have occurred but for the employee's violation, such as accepting free sausage sandwiches (Petition at 35-36). If neither alternative makes sense, that is because each is based

on the disciplinary component of the salary basis test and the disciplinary component makes no sense.

THERE IS UNQUESTIONABLY A SPLIT IN THE COURTS OF APPEALS ON THE ACTUAL DEDUCTION/THEORETICAL POSSIBILITY ISSUE.

Respondents assert, "A close examination of the Courts of Appeals' decisions in this area reveal that there is more consensus and less of a conflict than might appear at first glance" (RBO at 10). This is hardly a denial that there is a conflict in the Circuits. And even taking respondents' view of the Courts of Appeals' decisions, there are four different approaches to this issue (RBO at 10-11). There should be national uniformity on this issue and it can only come from this Court.

THE FACT THAT CERTIORARI WAS GRANTED IN AUER PROVIDES NO REASON NOT TO GRANT CERTIORARI HERE.

Respondents argue that this Court should not delay denial of the petition here because of the pendency of Auer v. Robbins in this Court because in Auer there was only a single deduction, that deduction was not made pursuant to an established policy and there were "unique circumstances" while in the present case, according to respondents, there were numerous deductions, there is an established policy and there were no "unique circumstances" (RBO at 11-12).

In the first place, however, no one knows what this Court will say in its opinion in Auer or how the decision or opinion in Auer will affect this case. For this basic and incontrovertible reason, even if this Court is not inclined to grant this petition at this time, this Court should not deny the petition but rather should wait for the opinion in Auer. And more specifically, on the issues in Auer, the actual

deduction/theoretical possibility question and the window of correction, petitioners' arguments in the Second Circuit Court of Appeals were severely limited by that Court's precedent of Martin v. Malcolm Pirnie, Inc., 949 F2d 611 (2d Cir, 1991), cert. denied, 506 US 905 (1992), and if this Court's decision is contrary to that case it would be most unfair to petitioners not to have the benefit of a remand after Auer. Also, in presenting this case to the Court of Appeals, petitioners did not have the benefit the brief filed in this Court by the Solicitor General in Auer, in which DOL changed its official position 180 degrees and argued that Auer was correctly decided.

In addition, if this case is as different from Auer as respondents contend, that is a reason the writ should be granted here. Petitioners here argue that the salary basis test is arbitrary and capricious, irrational and contrary to the intent of Congress as applied to the public sector; it does not appear that this argument is raised by the City of St. Louis in Auer. Moreover, respondents here argue that there was no established policy in Auer but that there is one here. However, this only begs the question of what an established policy is. In Auer it certainly was the city's policy that disciplinary sanctions including fines and suspensions were possible for violation of the residency requirement. Auer v. Robbins, 65 F3d 702, 711 (8th Cir, 1995), petition for cert. granted, No. 95-897 (1996). Here, although disciplinary sanctions were possible for any number of violations, there was no requirement that charges be brought upon probable cause that a violation had occurred, nor was there any requirement of any specific sanction for any particular violation (JA 17-18). This Court should grant the petition in this case as well as in Auer if this Court believes that clarification of the term "established policy" is relevant.

Respondents' repeated assertions that petitioners are somehow misleading this Court are both wrong and

annoying. Respondents cite instances of disciplinary sanctions imposed on managers but fail to recognize that disciplinary sanctions not inconsistent with the salary basis test are irrelevant (RBO at 12 n.11). In any event, what this record indicates about disciplinary sanctions inconsistent or arguably inconsistent with the salary basis test is that there are over 8,000 City managers and at most, respondents have shown only that three persons at one agency, and one person at another agency, none of whom are parties to this action, possibly received disciplinary sanctions inconsistent with the salary basis test in the four years between the beginning of the limitations period in this action and respondents' summary judgment motion (JA 50d, 516).[1] We believe it absolutely irrational for respondents herein to receive over 14

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[1] Respondent Vito LaBella was demoted for two weeks, which caused him to lose $258 in salary, but DOL has said in the Federal Register that demotions are permissible penalties (JA 301, 527, 783, 1156-60). 57 FR 37674. Respondent Harold Yourman was fined $6.25 but this sum was reimbursed in the next pay period and thus would come under the "window of correction" of 29 CFR section 541.118(a)(6) that is in issue in Auer (JA 528-29, 548). Respondent Theodore DiGilio was suspended for nine days but then, pursuant to a settlement, was reimbursed for the nine days that he did not work and agreed to forfeit four vacation days; thus, he also comes within the "window of correction" (JA 528-29, 591).

Disciplinary sanctions imposed on managers who are not respondents are irrelevant because a Rule 23 class action is not available under the Fair Labor Standards Act ("FLSA"); employees must "opt in" or they will not benefit from the judgment. 29 USC section 216(a); LaChappelle v. Owens-Illinois, Inc., 513 F2d 286, 288 (5th Cir, 1975). In any event, even considering managers who were not parties to this lawsuit, cryptic documents in the record, about which there was no testimony, seem to indicate that three managers at the Fire Department were fined five or ten days' pay (JA 244-46). In addition, one employee of the Department of Housing Preservation and Development, Marvin Wilkinson, was fined twice for failing to file a financial disclosure form (JA 250). Pages 239 and 456 of the Joint Appendix, cited by respondents (RBO at 12 n.11), do not contain evidence of disciplinary sanctions violative of the salary basis test.

million dollars[2] for work already performed, when they always understood that they were to work as many hours as necessary to discharge their responsibilities and their salaries were set on that basis, because of these five fines.

RESPONDENTS THEMSELVES HAVE DEMONSTRATED THAT WHETHER 29 CFR SECTION 541.118 IS A REGULATION OR INTERPRETATION IS AN ISSUE WORTHY OF REVIEW BY THIS COURT.

Respondents argue that under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984), the salary basis test must be upheld unless this Court finds it arbitrary and capricious or contrary to the intent of Congress (RBO at 21). Inasmuch as the test is arbitrary and capricious and contrary to the intent of Congress, the degree of deference to which the statute is entitled is irrelevant. If, however, the degree of deference becomes relevant, an issue worthy of review would be presented: whether the salary basis test is a regulation deserving Chevron deference or merely an interpretation, which would be entitled to deference only to the extent that it is persuasive, see Skidmore v. Swift & Co., 323 US 134,

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[2] Respondents quibble over the amount of the judgment (RBO at 7 n.9). The judgment is for $13,306,923.86 with post-judgment interest from May 5, 1995; this amount certainly is over $14 million by now (A 34). Respondents also were awarded $560,000 in attorneys' fees for services performed through August 30, 1995, which does not include any appellate work (JA 1828). Respondents were awarded time and one-half pay for their hours in excess of forty in any week and were awarded liquidated damages of double damages, so that they will in effect be paid at three times their hourly rate for hours in excess of forty, although they will receive no pre-judgment interest (RBO at 7 n.9). 29 USC section 216(b). More significantly, petitioners face five other similar cases with potential exposure of 20 to 25 million dollars in addition to the judgment and attorneys' fees award herein (Petition at 17).

139-40 (1944); Freeman v. National Broadcasting Company, Inc., 80 F3d 78, 83-84 (2d Cir, 1996) (Petition at 25-26). Congress did not instruct DOL to set the minimum wage, determine how many hours could be worked per week before overtime pay would be required, set the rate of overtime, or determine who would be exempt from the FLSA, but merely to define and delimit the managerial exemption. 29 USC section 213(a)(1).

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE WHETHER THE FACTS OF THIS CASE CONSTITUTE A DEFECT IN THE POLITICAL PROCESS LEADING TO AN INTRUSION ON THE AFFAIRS OF STATE AND LOCAL GOVERNMENTS PROHIBITED BY THE TENTH AMENDMENT.

Respondents reveal a complete failure to understand the issues both under the tenth amendment, and on the question of the deference to be accorded the salary basis test, in stating that when petitioners revised their policies to conform to the salary basis test after the District Court ruled on liability, petitioners "obeyed the law" (RBO at 27). But DOL was not authorized by Congress to lay down the law of the terms of the employment contracts between State and local governments and their managerial employees. DOL merely was authorized to define and delimit the phrase "bona fide executive, administrative or professional capacity," i.e., to come up with a test that one could hold up against the employment policies at issue to determine whether the position at issue was a "bona fide executive, administrative or professional" position. In practice, however, because of the public accountability and progressive discipline

principles, DOL has denied the managerial exemption to the States.[3]

There is no question that the principal purpose of the FLSA was to prohibit substandard labor conditions. Barrentine v. Arkansas-Best Freight Systems, 450 US 728, 739 (1981); Freeman v. National Broadcasting Company, Inc., supra, 80 F3d at 86. The statute, enacted during the Great Depression, itself states that its purpose was to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 USC section 202(a); see Brooklyn Savings Bank v. O'Neil, 324 US 697, 707 n.18 (1944) (Congress intended the FLSA "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."). Notably, the reason that the FLSA provides for liquidated damages of twice the backpay owed (which respondents were awarded) is that Congress recognized that the "failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' ... that double payments must be made ... in order to insure restoration of the worker to

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[3] We note that this Court recently held that the interstate commerce clause is not sufficient authority for Congress to abrogate the States' eleventh amendment immunity from suit in federal court, relying principally on the fact that the eleventh amendment postdated the interstate commerce clause. Seminole Tribe v. Florida, ___ US ___, 116 S Ct 1114 (1996). Similarly here, the tenth amendment postdated the interstate commerce clause and we submit that in light of Seminole Tribe, and because the salary basis test interferes with the employment relationship between the States and their highest-level employees, DOL's failure to amend the salary basis test when DOL has admitted for years that it needs revision, constitutes a defect in the national political process that rises to the level of a tenth amendment violation.

that minimum standard of well-being." Brooklyn Savings Bank v. O'Neil, supra, 324 US at 707 (quoting 29 USC section 202(a)) (footnote omitted).

Here, respondents, each and every one a well-paid manager, seek to use the FLSA not as a shield against substandard living conditions but as a sword to recover a windfall that no one ever thought was part of their agreed-upon compensation. We respectfully submit that recovery by respondents herein makes a mockery of the purposes of the FLSA and its humanitarian goals at the expense of the taxpayers of State and local governments large and small. This Court must grant the petition in order to address the serious legal issues raised by petitioners and declare invalid the salary basis test. Such a declaration would leave intact the "duties test," 29 CFR sections 541.1 and 541.2 (Petition at 5-7), for determining whether an employee is within the managerial exemption (and which respondents unquestionably satisfy).

Respectfully submitted,

PAUL A. CROTTY
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

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* Attorney of Record.